Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1834

COCA-COLA BOTTLING COMPANY OF MEMPHIS,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 1196,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Coca-Cola Bottling Company of Memphis, prays that a Writ of Certiorari issue to review the judgments of the United States Court of

Appeals for the Sixth Circuit entered in case no. 75-2172 and in case no. 78-1104.

OPINIONS BELOW

The opinions of the Court of Appeals (Appendix 172-173 and 4-6) are not yet officially reported. The decision of the United States District Court for the Western District of Tennessee is reproduced herein. (Appendix 174-180). The National Labor Relations Board's two decisions and orders are reported at 232 NLRB No. 125 (Appendix 14-144) and at 239 NLRB No. 183 (Appendix 7-13).

JURISDICTION

The judgments of the Court of Appeals for the Sixth Circuit were entered in case no. 75-2172 (Appendix 172-173) on February 22, 1980, and in case no. 78-1104 (Appendix 4-6) on February 25, 1980. A timely petition for rehearing *en banc* was denied on April 3, 1980. (Appendix 3), and this petition for certiorari was filed within 90 days of that date. A 30 day stay of mandate of the two Court of Appeals judgments was granted to permit the filing of this petition. (Appendix 1-2) This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. May the National Labor Relations Board bypass its own procedures for safeguarding the freedom of employee choice by changing the certified bargaining representative without an election?

2. Should employees' rights to an election, when an uncoerced majority of such employees have signed a petition repudiating their union, be sacrificed in favor of stability of bargaining relations?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, *et seq.*), for the convenience of the Court, are set forth below:

Section 1 . . . It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and *by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing,* for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. (Emphasis added).

Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended (61 Stat. 140, 29 U.S.C. 158), provide:

> Section 8. (a) It shall be an unfair labor practice for an employer—

> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> . . .
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

A portion of Section 9(a) of the same Act (61 Stat. 143, 29 U.S.C. 1559) is also herein set forth:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purpose, shall be the exclusive representatives . . .

STATEMENT OF THE CASE

This case arises in a factual situation not atypical in the current American industrial scene — the merger of two national unions. The issue is whether a concern for the stability of collective bargaining may be permitted to override employee participation in such mergers and to inhibit the right of such employees to designate their collective bargaining representative.

On June 28, 1968, the National Labor Relations Board certified the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery

Workers (herein called "Brewery Workers") as the bargaining representative of Petitioner's (herein called the "Company") production and maintenance employees. On November 12, 1971, the Company and the Brewery Workers and its local Union No. 196 (herein "Local 196") executed a new collective bargaining agreement effective from November 12, 1971 to November 12, 1974. The bargaining unit consists of approximately 450 employees.

In September, 1973, the Brewery Workers entered into a "Merger/Affiliation Agreement" with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called "Teamsters") supplemented in October by a "Memorandum of Understanding." The agreements terminated the rights of local unions under the constitution of Brewery Workers and immediately subjected them to the provisions of the agreement and the constitution of the Teamsters, including charter provisions, upon the issuance of charters to them. Thereafter, the chartered local unions would be required to remit per capita taxes, initiation fees and other obligations as set forth in the Teamsters constitution to the Teamsters and be governed in all other respects by such constitution. The locals were required to affiliate with respective joint councils and area conferences of the Teamsters and to affiliate with a National Conference of Brewery and Soft Drink Workers. Negotiations by local unions as well as economic or other action in support of collective bargaining positions or labor dis-

putes would be governed by specific provisions of the Teamster constitution.

Thereafter, all property and assets of Brewery Workers were transferred to the Teamsters. Teamsters assumed only such debts and obligations which had been disclosed and accepted by it. The Teamsters were excepted from all liability for breaches of contracts or agreements to which Brewery Workers or one of its former locals were parties. The number of former Brewery Workers representatives to be hired by the Teamsters would vary with the number of members in local unions of the Brewery Workers which filed applications by December 31, 1973.

The employees of the Company did not participate in the decision of Local 196 to affiliate with the Teamsters as shown in the minutes of its meetings. On October 3, 1973 its then business manager told employees that he would attend a convention in November in Cincinnati and would vote according to what he thought would be for the benefit of all. On November 7, 1973, there was a general discussion among the membership on the merger, but the business manager was at the convention pertaining to the merger.

On November 16, 1973, Teamsters issued a local union charter to "Local Union No. 1196" and on November 21, 1973 a charter contract was signed. On December 5, 1973, the president of Local Union No. 196 announced at the regular membership meeting

that "we are now Teamsters Local 1196." At that same meeting: the business manager resigned; employees were told that the union would have to move from its present location; employees were told that their dues were being increased to $8.00 a month, the minimum dues for Teamsters; employees complained that they had not received any notification or letter about joining the Teamsters union; the president apologized for questions he could not answer about the affiliation; the business manager informed the employees that the Teamsters International constitution had superseded their local bylaws; and a "new" executive board for the local was nominated, seconded and accepted.

On March 3, 1974, after the Company had declined to recognize the new Teamsters Local 1196 as representative of its production and maintenance employees, a vote was held at a Teamster local union hall on the issue of affiliation. Voting rights were restricted to 212 people, 122 of whom had been on dues checkoff to Local 1196 and 90 additional employees who had signed Teamsters dues checkoff cards. Eighty-one members voted with 78 in favor and 3 opposed. Other members of the local, employed by other employers, voted separately on the change in affiliation, 119 in favor, 1 opposed.

The new Teamsters Local 1196 filed a petition with the National Labor Relations Board seeking to amend the certification to substitute itself for Brewery Workers. The Board's Regional Director, in amending the

certification, concluded that Teamsters Local 1196 was a continuation of Local 196 and that the private election in which only union members participated was a valid ratification of the affiliation. (On July 8, 1974, the Board denied the Company's request for review of such decision).

The Company declined to extend recognition to Teamsters Local 1196 and an unfair labor practice charge was filed. This is the statutory method by which a company secures Court review of a Board decision involving questions concerning representation. Sections 10(e) and (f)., 61 Stat. 140, 29 U.S.C. 160.

The Board's decisions, enforced without discussion by the Court below, concluded that, notwithstanding the disappearance of the certified bargaining representative in the merger and the totally changed methods by which the newly chartered local could conduct its affairs, the changes were essentially an internal union affair which could be decided solely by a vote of the union members. Thus, whether employees would be represented by a Teamsters union or no union at all was decided in balloting conducted, not by the Board itself, but by the very party seeking representative status among an electorate restricted to those most likely to cast favorable ballots.

In September, 1974, approximately 330 employees signed in support of a petition for a Labor Board conducted election to decertify Teamsters Local 1196 as

their collective bargaining representative. Initially, the National Labor Relations Board, in a decision later vacated, held that such a petition, emanating from the employees, created a question of representation. (Appendix 149-171; 155) In a subsequent decision, the National Labor Relations Board refused to find that a question of representation existed and required the company to bargain with Teamsters Local 1196, a directive enforced by the Court below. Although the Board found that, in ordinary circumstances, the Company "could rest a doubt" upon such a petition (Appendix 125-126, fn. 77), it refused to acknowledge that the doubt demonstrated a question concerning representation because the Company had elected to test the amended certification by refusing to bargain.

It is upon the issue of the absence of employee choice — twice refused — that certiorari is now sought. The Board, with Court approval, first denied employee participation in a change of collective bargaining representative. The choice of employees, demonstrated in an uncoerced petition, was again denied legal effect, and the employees were cast into the escapeless clutches of their new collective bargaining representative.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises An Important Question of Administration Of Federal Law Which Should Be Settled By This Court.

The national labor policy rests upon twin cornerstones — encouraging the practice and procedure of

collective bargaining and protecting the freedom of employees to designate their own representatives. In this case the former has been accorded paramount status to the exclusion of the latter. Yet neither purpose has legislative primacy. Each case must strike a proper balance, when the purposes conflict, to achieve a result compatible with the total policy of the Act.

The Board's current policy is that in a change of affiliation the only effect of an amendment of certification is to reflect a name change and that the representative character of the bargaining agent has not been altered. This policy, blinded to facts, can, if allowed to continue, dramatically affect the nation's workforce to the detriment of employee rights. Its growing importance is exemplified by the proliferation of mergers among national unions presently in progress. Here, the certified representative, Brewery Workers, had passed from existence; the employees became members of an entirely new international union; the relationship of their local union to its international totally changed under the new constitution; and, the bylaws, number of officers, dues structure, and concerted action obligations were changed. Despite these facts, the Board concluded that the identity of the bargaining representative had continued essentially unchanged. Only an irrebuttable presumption, grounded in the policy that bargaining not be interrupted to ascertain employee choice, could support such a conclusion. In consequence of the application of this policy, certification was amended, based upon a belated ratification by an

electorate artificially restricted by the designated beneficiary of the vote. The Board's professed requirement for amendment is that the identity of the representative has continued essentially unchanged and that the *members of the union* have been afforded an opportunity to consider and vote on the proposed changes through a democratic process. See, *e.g., East Dayton Tool & Die Co.*, 190 NLRB 577 (1971); *Hamilton Tool Co.*, 190 NLRB 571 (1971).

That the Board needs the guidance of this Court's authority in resolving the conflict of policy is demonstrated by its own changes in policy and by continued disagreement among Board members in resolving the problems created by restriction of employee free choice. The currency of present policy is only as old as the last decision in this case. On the same day, January 3, 1979, the Board reaffirmed its decision in a case involving the affiliation of a certified independent union with an international union. *Amoco Production Co.*, 239 NLRB No. 182, 100 LRRM 1127, rem'd for further findings, ____ F.2d ____ (5th Cir. March 7, 1980), 103 LRRM 2810. Two members dissented. Member Jenkins accepted the validity of a private election but would grant an amendment of certification only if *all* employees in the bargaining *unit* were afforded an opportunity to participate in the selection. Member Pennello argued that no private vote should be given effect, that the impact of the change upon employees created a question concerning representation, and such questions could properly be resolved only in an elec-

tion conducted by the National Labor Relations Board. The *Amoco Production Company* decision specifically overruled a prior holding, in *Jasper Seating Co.*, 213 NLRB 1025. There the Labor Board had refused an amendment of certification because nonmembers had been barred from the vote. The difference in the two decisions is due to a change in composition of the members of the National Labor Relations Board. So fundamental a question of employee rights should not be dependent upon fluctuation of appointments.

This factual situation demonstrates that continued identity of the bargaining representative, in reality, is a matter of policy definition rather than one of fact. In other words, if it be affiliation, stability of bargaining requires that actual changes be ignored. The merger of Brewery Workers into Teamsters was orchestrated by international representatives far removed from the employees in the bargaining unit, some of whose employment by Teamsters depended upon how many locals affiliated. "Affiliation" was accomplished by the local officers. The only participation by employees was by a group, roughly approximating in number those who had signed new authorization cards for Teamsters Local 1196, months after the fact and under circumstances in which they could not, because of the vote of members from other employers, have had an impact on the affiliation results.

Under the Act, the Board is charged with the responsibility to resolve questions of representation. The

question is whether the Board has the authority to abdicate its statutory responsibility in favor of union officers who have all to gain by the private vote. The potential adverse effect is demonstrated in this case. A majority of the employees petitioned to rid themselves of the union within a few months of the Board's decision. Is the policy of stabilizing collective bargaining so paramount that an unwanted union should be foisted upon employees whose voice, appropriately measurable in an election by the National Labor Relations Board, is denied expression?

In sum, certiorari should be granted to restore to employees rights in a change of bargaining representative equal to those in an initial selection.

2. The Decision Below Conflicts With The Decisions Of Another Court of Appeals On The Appropriateness Of The Amendment Of Certification Procedure.

The necessity for this Court to establish a proper balance between employee freedom of choice and bargaining stability is demonstrated by the conflict between the Sixth and the Third Circuits on the appropriateness of the amendment of certification procedure. *American Bridge Division, U.S. Steel Corp. vs. N.L.R.B.*, 457 F.2d 660 (3rd Cir. 1972); *N.L.R.B. vs. Bernard Gloekler North East Co.*, 540 F.2d 197 (3rd Cir. 1976).

In *American Bridge,* the leadership of an independent union of 304 members affiliated with the 1,120,000-member United Steel Workers of America. Pursuant to notice, a meeting was held of the membership, at which a representative of the Steel Workers spoke and answered questions. Subsequently, a vote was conducted. The Third Circuit's primary concern was whether a Board-supervised election under Section 9 was required, or whether the amendment of certification procedure was permissible. As in this case, the Board had amended the certification, predicated upon the union-run affiliation election. The Court concluded that the new union was something quite different from the earlier organization "because the people who conducted the substantial part of the unit dealings with management are no longer the association's officers, and the power of the unit's members to control those agents is radically changed. In other words, there is a clear question of representation: Will the unit's members be represented by their own local officers or by the Steel Workers Union? . . . The language of the existing contract, the local officers and the employees covered by the contract may be the same, but the rights of the parties have changed. By virtue of affiliation the new local becomes subject to the international constitution of Steel Workers Union . . ." 457 F.2d at 663. Accordingly, a Board supervised election was held to be essential.

Certain factors, identical in principle in this case, were primary considerations of that decision: (1) the lo-

cal union affiliated with an international union substantially larger and, (2) although certain local officers remained the same, the rights of the parties had been changed by the creation of new rights vested in the international; e.g., options to approve strikes and to assist in the adjustment of grievances.

In *Bernard Gloekler*, an independent union had a bargaining agreement with a company which, under Labor Board policy, barred an election. During the contract term, an affiliation vote was conducted as to joinder with the United Automobile, Aerospace, & Agricultural Implement Workers of America. The Court agreed with the company's refusal to deal with the new union, finding that the purported affiliation vote raised a question concerning representation which could not be addressed during the contract term.

As in *American Bridge*, the Court was persuaded by the change in the previous local's structure, administration, assets, membership, autonomy and bylaws — factors common to all three cases. The company was faced with a new union with new economic options and with a different focus of power. Consequently, the change in bargaining entity denied the efficacy of an amendment of certification and required, as the only available avenue, a Board supervised election.

This Court should grant certiorari to resolve the conflict between the circuits over the extent to which

the Board may bypass its own procedures to accord status to a changed bargaining representative.

3. The Decision Below Is In Conflict With Decisions Of This Court.

In its landmark decision authorizing the Board to impose bargaining order remedy based upon authorization cards, this Court acknowledged the superiority of the election process. *N.L.R.B. vs. Gissel Packing Co., Inc.*, 395 U.S. 575, 603 (1969).[1] In justifying its decision, the Court noted that there was, . . . "after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they do so by filing a representation petition." *Id.* at 613. As the Court pointed out, this was but a reiteration of its prior teaching that orders were not intended to fix a "permanent bargaining relationship without regard to new situations that may develop." A bargaining relationship must be permitted to "exist and function for a reasonable period" and have a "fair chance to succeed," but, after "such reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." *Franks Bros. Co. vs. N.L.R.B.*, 321 U.S. 702, 705-706 (1944).

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1 Accord: "In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored." *Linden Lumber Division vs. N.L.R.B.*, 419 U.S. 301-307 (1977).

The refusal of the Board to give recognition to the employee petition, *after* the amendment of certification, is inconsistent with the teachings of the above cases. This is not a situation in which the Board found a loss of majority resulting from the unfair labor practices of the employer. *Cf. Medo Photo Supply Corp. vs. N.L.R.B.*, 321 U.S. 678 (1944). There is no finding that any unfair labor practice of the Company contributed to the union's loss of majority. Assuming the premise underlying the Board's decision that there was no change in the bargaining representative, the relationship had been given a reasonable period in which to succeed. Indeed, it had borne fruition in two collective bargaining contracts.

The petition by the employees was following the directive and course which this Court has anticipated and approved: "If the employees are dissatisfied with their chosen union, they may submit their own grievance to the Board." *Brooks vs. N.L.R.B.*, 348 U.S. 96, 103-104 (1954).

The bargaining violation found by the Board, which was enforced without discussion by the Court below, is a technical one required by statute as the sole method to secure Court review of a Labor Board decision in a representation proceeding — here an amendment of certification. There was no finding that it contributed to any loss of majority support. Indeed, no bargaining had been postponed as a result of the company's action at the time the petition was filed. There was no con-

tention of violations of the collective bargaining agreement then in effect except the transfer of a holiday and the company's refusal to remit to Teamsters Local 1196 those dues authorized for checkoff to Local 196.[2]

The Labor Board itself initially recognized in its first decision that a valid question concerning representation had been raised and its original order to bargain terminated with the conclusion of the contract. (Appendix 155) Subsequently, after vacating its first decision (Appendix 145-148), the Board directed future bargaining.[3]

The refusal to give effect to the subsequent employee petition presents another aspect of the Labor Board's mechanistic treatment of union affiliation proceedings in which it has adopted a policy of ignoring the realities of change which require employee participation. The policy evidences a logical contradiction. It requires bargaining for a reasonable time, as in the establishment of a bargaining relationship, yet, at the same

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2 The second case upon which certiorari is sought originated in the U.S. District Court to compel arbitration of these issues under Section 301 of the National Labor Relations Act.

3 In *Mission Mfg. Co.*, 128 NLRB 275, the Board permitted withdrawal of recognition upon valid considerations and omitted a bargaining obligation in its remedial order. In *Midwestern Instruments, Inc.*, 133 NLRB 1132, the Board required bargaining when requested only "by a majority representative of [Respondent's] employees" and left for appropriate proceedings, the determination if there were such representatives. This was despite a finding of a refusal to bargain on merit increases. There was evidence of the loss of majority by the union, but the refusal to bargain had not contributed to the loss of majority.

time, insists that the relationship is but a continuation of the old.

A fundamental and necessary concomitant of this Court's decisions in bargaining order cases has been its confidence that, having been given a reasonable chance to succeed, a bargaining situation may be changed or eliminated by employee free choice through Board procedures. Any bargaining remedy which perpetuates a bargaining relationship when a union's loss of majority was not induced by employer unfair labor practices ignores the essential balance contemplated in the Court's support of bargaining orders with a minority union. A federal court should not "foist upon the employees an order to bargain with a union which they, according to their latest decision, no longer regard as the representative of their choice."[4]

---

4 *N.L.R.B. vs. Patent Trader, Inc.*, 415 F.2d 190, 200 (2nd Cir. 1969).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted this ____ day of May, 1980.

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CERTIFICATE OF SERVICE

In accordance with the provisions of Rule 33 of the Supreme Court rules, I certify that I have caused a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to be served on the following persons by mailing three copies of same via certified mail, return receipt requested, postage prepaid;

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OCTOBER TERM, 1979

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COCA-COLA BOTTLING COMPANY OF MEMPHIS,
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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 1196,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CONSOLIDATED CASES

Nos. 75-2172 and 78-1104

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE COCA-COLA BOTTLING COMPANY
OF MEMPHIS,
Appellant,

versus No. 75-2172

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, LOCAL UNION NO. 1196,
Appellee.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, LOCAL UNION NO. 1196,
Intervenor,

versus No. 78-1104

THE COCA-COLA BOTTLING COMPANY
OF MEMPHIS,
Respondent.

MOTION TO STAY MANDATE

COMES NOW, The Coca-Cola Bottling Company of Memphis, through undersigned counsel, and files this its Motion to Stay Mandate for thirty (30) days pending application to the Supreme Court for a Writ of Certiorari.

Respectfully submitted this 7th day of April, 1980.

/s/ ANDREW C. PARTEE, JR.
ANDREW C. PARTEE, JR.

/s/ WALTER W. CHRISTY
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COMPANY OF MEMPHIS

Motion Granted:
/s/ LIVELY, J.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Number and Title Omitted)

ORDER

BEFORE: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and PHILLIPS, Senior Circuit Judge.

No judge in active service on the court having requested rehearing en banc, the petition for rehearing filed herein by the appellant and respondent has been referred to the panel which heard the appeals. Upon consideration of the petition for rehearing, the court concludes that the issues raised therein were fully considered upon the original submission of these appeals.

Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER
OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Filed: April 3, 1980

JOHN P. HEHMAN,
Clerk

CASE NO. 78-1104

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,
LOCAL UNION NO. 1196,
Intervenor,

versus No. 78-1104

THE COCA-COLA BOTTLING COMPANY
OF MEMPHIS,
Respondent.

Filed: Feb. 25, 1980

ORDER

BEFORE: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and PHILLIPS, Senior Circuit Judge.

This matter is before the court on the petition of the Board for enforcement of two decisions and orders and the cross-application of Coca-Cola for review. Reference is made to the decisions and orders reported at 232

NLRB No. 125 and 239 NLRB No. 183 for the issues and factual setting of the dispute between Coca-Cola and Teamsters Local No. 1196.

The Board found that Coca-Cola violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the union local after its affiliation with the Teamsters International. The local was affiliated with the Brewery Workers International at the time Coca-Cola entered into a collective bargaining agreement with Local 196 and the Brewery Workers International. The Board found that Teamsters Local 1196 was a continuation of Brewery Workers Local 196 and there was no justification for Coca-Cola's withdrawing recognition. Upon consideration of the record before the court together with the briefs and oral arguments of counsel, the court concludes that the finding of a violation by withdrawal of recognition is supported by substantial evidence.

Substantial evidence in the record also supports the Board's finding that Coca-Cola violated Section 8(a)(1) of the Act by assisting and encouraging employees to withdraw from the union after Brewery Workers Local 196 affiliated with the Teamsters International and also supports the Board's finding that Coca-Cola violated Section 8(a)(3) and (1) of the Act by coercing, threatening with discharge, and by delaying the reinstatement of several employees who were engaged in an unfair labor practice strike.

The Board also found that Coca-Cola violated Section 8(a)(3) and (1) of the Act by discharging employee Jackson because of her support of the union. Our review of the record convinces us that employee Jackson was insubordinate to several of her supervisors and that her discharge was justified by this conduct. We fail to find substantial evidence to support the finding that Jackson's discharge occurred because of her support of the union. Though Jackson was a union supporter, her discharge took place at a time when the recognition dispute between Coca-Cola and Local 1196 was before the Board for decision, and the incident which led to her termination was completely unrelated to that dispute.

Accordingly, the decision and order, 232 NLRB No. 125 and the supplemental decision and order, 239 NLRB No. 183, are enforced in full except for those provisions finding a violation in the discharge of employee Jackson and requiring that she be offered reinstatement with restitution for lost earnings. The Notice to Employees appended to 232 NLRB No. 125 will be amended by eliminating all references to employee Jackson.

ENTERED BY ORDER
OF THE COURT

John P. Hehman, Clerk

/s/ GRACE KELLER
Chief Deputy Clerk

239 NLRB No. 183 D-4537
Memphis, Tenn.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 26—CA—5213,
26—CA—4991,
26—CA—5620, and
26—CA—5729

THE COCA-COLA BOTTLING COMPANY
OF MEMPHIS

and

MAGNOLIA JACKSON, an Individual

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,
LOCAL UNION 1196

SUPPLEMENTAL DECISION AND ORDER

On September 30, 1977, the National Labor Relations Board issued its Decision and Order[1] in the above-entitled proceeding finding that Respondent had engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations

1 232 NLRB No. 125.

Act, herein called the Act, as amended. Respondent was ordered, *inter alia,* to cease and desist from refusing to bargain collectively concerning rates of pay, hours of employment, and other terms and conditions of employment with the Union as the exclusive bargaining representative of the employees in the appropriate unit. On July 3, 1978, the United States Court of Appeals for the Sixth Circuit granted the Board's motion to withdraw the record pending reconsideration by the Board of whether or under what circumstances nonunion bargaining unit employees must be given the right to vote in union affiliation elections. On August 4, 1978, the Board notified the parties that it had decided, *sua sponte,* to reconsider its decision, and advised all parties that they could submit statements of position to the Board with respect to the issues. Such statements were received from Respondent, General Counsel, and the Union.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reconsidered its decision in light of the entire record and the parties' statements and has decided to reaffirm its previous Decision and Order under the rationale and criteria discussed in *Amoco Production Company,* 239 NLRB No. 182 (1978).

On June 28, 1968, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers was certified as the exclusive collective-bargaining representative of certain employees of Respondent at its Memphis, Tennessee, location. Thereafter, Respondent entered into a collective-bargaining relationship and signed a collective-bargaining contract with the certified union and its Local 196. In October 1973, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein referred to as the Teamsters International, agreed to merge the two International Unions effective December 31, 1973. Pursuant to the agreement Teamsters International granted Local 196 a charter as Local 1196 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

On May 7. 1974, the Acting Regional Director for Region 26 issued his decision and amendment of certification in Case 26—AC—24, wherein he amended the certification of representative by substituting the name "International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196" for "International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers." On July 8, 1974, the Board denied Respondent's request for review of the decision and amendment.

On June 30, 1975, in Case 26—CA—5213, the Board granted a partial summary judgment and found that Respondent's refusal to bargain with the Union violated Section 8(a)(5).[2] On a motion by the Union, on November 28, 1975, the Board issued an unpublished order vacating its June 30, 1975, Decision and Order, and remanded the case for hearing with Cases 26—CA—4991, 5620, and 5729. The hearing resulted in the Board's Decision and Order, 232 NLRB No. 125, *supra*.

In reaffirming the validity of the underlying Amendment of Certification, we have specifically considered the following facts:

In mid-February 1974, the Union decided to hold a special meeting to discuss and conduct a secret-ballot election to determine whether the members favored affiliation with the Teamsters International. Notices dated February 19, 1974, were posted and distributed in the plant addressed to "All Union Members employed at Coca-Cola," and stated that the purpose of the meeting was for all union members at Coca-Cola to consider, discuss, and vote in a secret-ballot election on the question of Local 196's affiliation with the Teamsters International. At the meeting the Union's counsel announced the purpose of the meeting, conducted a discussion on the pros and cons of affiliation, then held the affiliation election. Names were checked off an

2 218 NLRB No. 129.

eligibility list which consisted of the names of unit employees who had signed dues-checkoff or authorization cards for either Local 196 or the Teamsters.[3] After the voter's name was checked off the list, the member received a ballot and voted in a private booth. After voting for or against affiliation with the Teamsters International, the member deposited the ballot into a secured ballot box. The results showed that of the ballots cast, 78 votes were for and 3 were against affiliation, with 1 void ballot. Also, there is no dispute that all members, and nonmembers who chose to become members, were given an opportunity to vote.

In view of the foregoing, we find that there was no denial of due process and no impropriety in the affiliation voting procedure: there was adequate and proper notice, discussion, time for reflection, an orderly vote, reasonable precautions to maintain the secrecy of the ballots, and nonmembers were not foreclosed from an opportunity to become members and to then participate in the election.

In *Amoco, supra,* we held that an affiliation vote is basically an internal union matter and where the vote has been conducted with due regard for adequate due process, we will recognize and give effect to the result of the vote. Thus we find that the affiliation vote in-

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3 At that time, there were approximately 490 employees in the bargaining unit, of which approximately 212 names were on the eligibility list.

volved here was valid even though the votes of nonunion bargaining unit employees who were denied the right to vote because of their nonmember status could have determined the outcome of the vote.

Therefore, we affirm our original Conclusions of Law and Order and find, *inter alia*, that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively concerning rates of pay, hours of employment, and other terms and conditions of employment with the Union as the exclusive bargaining representative of the employees in the appropriate bargaining unit.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby affirms its original Decision and Order in this proceeding and orders that the Respondent, The Coca-Cola Bottling Company of Memphis, Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Board's original Order (232 NLRB No. 125).

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4 Member Truesdale, who was not a member of the Board when the underlying issues in this case were considered and decided, agrees with the decision herein, but relies additionally on the reasons stated in his concurring opinion in *Amoco Production Company, supra.*

Dated, Washington, D.C. January 3, 1979.

John H. Fanning, Chairman

Betty Southard Murphy, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

232 NLRB No. 125 D-2810
Memphis, Tenn.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

THE COCA-COLA BOTTLING
COMPANY OF MEMPHIS

and

MAGNOLIA JACKSON, an Individual

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,
LOCAL UNION 1196

Cases 26—CA—5213,
26—CA—4991,
26—CA—5620, and
26—CA—5729

DECISION AND ORDER

On August 31, 1976, Administrative Law Judge Bernard Ries issued the attached Decision in this proceeding. Thereafter, the Respondent and the General Counsel filed exceptions and supporting briefs, and the Charging Party filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, the cross-exceptions, and the briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith, to modify his Remedy,[1] and to adopt his recommended Order, as modified.

The General Counsel excepts to the Administrative Law Judge's failure to find, in accord with the complaint, that the Respondent, during July 1975, violated Section 8(a)(1) of the Act by asking striking employees if they had quit their jobs with the Respondent.

The Administrative Law Judge found, and we agree, that the strike, which commenced July 7, 1975, was an unfair labor practice strike from its inception; that the Respondent, through Personnel Director Donaldson, told the strikers to come to the plant for their paychecks; that Donaldson asked a number of employees if they had quit their jobs; that if their reply was nega-

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1 In accordance with our decision in *Florida Steel Corporation*, 231 NLRB No. 117 (1977), we shall apply the current 7-percent rate for periods prior to August 25, 1977, in which the "adjusted prime interest rate" as used by the Internal Revenue Service in calculating interest on tax payments was at least 7 percent.

tive, Donaldson would then ask why they were not at work; and that if it was positive, the conversation ended forthwith.

The Administrative Law Judge, conceding that no apparent legitimate reason existed for such questioning of striking employees James Watson and Isaac Parker, found, nevertheless, that the interrogations had no coercive overtones which would tend to inhibit the strikers in the exercise of their protected rights. In our view the clear implication of the questioning was that the striking employees would not be considered as having quit and thus be out of a job if they were not working. This was plainly coercive and constituted an 8(a)(1) violation.

In adopting the Administrative Law Judge's recommended Order, we correct an apparently inadvertent error by including a provision that Respondent offer immediate and full reinstatement to all strikers who apply therefor.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, the Coca-Cola Bottling Company of Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the ac-

tion set forth in the recommended Order, as so modified:

1. Insert the following as paragraph 1(d) and reletter the subsequent paragraphs accordingly:

"(d) Coercing employees and discouraging them in the exercise of their protected rights to engage in a concerted refusal to perform work."

2. Substitute the following for paragraph 2(a):

"(a) Offer to Magnolia Jackson, Robert Lambe, and, upon application, all other employees who participated in the strike which began on July 7, 1975, and who have not already been reinstated, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, dismissing, if necessary, any persons hired as replacements by Respondent on or after July 7, 1975. Respondent shall also make whole these employees for any loss of earnings they may have suffered by reason of Respondent's refusal, if any, to reinstate them in accordance with the terms of this recommended Order."

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C., September 30, 1977.

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing in which all parties were represented and had the opportunity to present testimony, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice.

WE WILL NOT discharge, refuse to reemploy, refuse to reinstate, or otherwise discriminate against any employees in regard to their hire, tenure of employment, or any term or condition of their employment in order to discourage membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196, or any other labor organization.

WE WILL NOT threaten employees, offer benefits to employees, vilify employees, assist employees in circulating petitions, coerce employees to sign petitions, or give employees the impression that we have been keeping their union activities under surveillance, in order to discourage membership in or other activity on behalf of the above-named Union or any other labor organization.

WE WILL NOT coerce or discourage our employees in the exercise of their protected rights to engage in a concerted refusal to perform work.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

The appropriate bargaining unit at our plant is:

> All production and maintenance employees at the Coca-Cola Bottling Company at Memphis, Tennessee, operation, including driver-salesmen, driver-helpers, relief drivers, pre-mix, advertising, garage, cooler and fork-lift employees, excluding office clerical employees, guards, professional and technical employees and supervisors as defined in the Act.

WE WILL, upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate bargaining unit with respect to rates of pay, hours of employment, and other terms and conditions of employment of the employees included within the appropriate bargaining unit.

WE WILL pay to the above-named labor organization all moneys we have deducted from employees' wages pursuant to dues-checkoff authorization cards from said employees from May 7, 1974, to November 12, 1974, together with interest, as we were required to do under the terms of the collec-

tive-bargaining agreement with the above-named labor organization.

WE WILL offer to Magnolia Jackson, Robert Lambe, and upon application, to all our other employees who have engaged in the strike which began on July 7, 1975, and who have not already been reinstated, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any employees hired as replacements since the beginning of the strike.

WE WILL make such applicants whole for any loss of earnings they suffered by reason of any refusal on our part to reinstate them.

WE WILL make Leo Rainey and Stephen Baiel whole for any loss of earnings, seniority, or other rights and privileges they may have suffered by reason of our unlawful discrimination against them.

THE COCA-COLA BOTTLING
COMPANY OF MEMPHIS
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Mid-Memphis Tower, Suite 800, 1407 Union Avenue, Memphis, Tennessee 38104, Telephone 901—521-2687.

JD-560-76
Memphis, TN

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE COCA-COLA BOTTLING
COMPANY OF MEMPHIS

and

MAGNOLIA JACKSON, An Individual

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,
LOCAL UNION 1196

Cases Nos. 26-CA-5213
26-CA-4991
26-CA-5620
26-CA-5729

William D. Levy, Esq., of
Memphis, TN, for the
General Counsel.

Lynn Agee, Esq., of
Youngdahl, Larrison &
Agee, Memphis, TN, for
the Charging Parties.

Andrew C. Partee, Jr., Esq.,
of *Kullman, Lang, Inman & Bee*, New Orleans, LA, and
Richard A. Brackhahn, Esq.,
of Memphis, TN, for the
Respondent.

DECISION

Statement of the Case

BERNARD RIES, Administrative Law Judge: These consolidated cases were heard in Memphis, Tennessee, on October 28-31 and December 1, 1975, and March 16-19 and 25, 1976.

A complaint and notice of hearing issued in Case 26-CA-5620 on July 10, 1975, alleging that Respondent had violated Section 8(a)(3) and (1) by the discharge, on June 6, 1975, of employee Magnolia Jackson. On July 7, a strike was called at Respondent's plant. On October 8, 1975, the Regional Director issued an amended consolidated complaint, in which he (1) included the allegation relating to Magnolia Jackson contained in Case 26-CA-5620; (2) set aside a settlement agreement earlier concluded, on March 11, 1974, in Case 26-CA-4991, and alleged that in January and February 1974, Respondent had, on several occasions, solicited employees to sign petitions opposing Teamsters Local Union 1196, sometimes accompanied by threats and

promises; and (3) alleged that, beginning in February 1975, and at various times thereafter, both prior to and subsequent to the July 1975 strike, Respondent had violated Section 8(a)(3) and (1) in several respects.[1]

In Case No. 26-CA-5213, the Board had, on June 30, 1975, partially granted a motion by the General Counsel for summary judgment on a complaint alleging Respondent's refusal to bargain with Teamsters Local Union 1196, in violation of Section 8(a)(5). Because of certain circumstances to be discussed *infra*, the Board had found a limited violation, concluding that Respondent's duty to bargain had terminated on November 12, 1974, with the expiration of the contract between Respondent and the predecessor of Teamsters Local Union 1196 (218 NLRB No. 129). Thereafter, on October 14, the Union filed with the Board a Motion to Set Aside Board Order or To Modify the Board's Decision in Case No. 26-CA-5213, asserting that certain matters soon to be heard by me in Cases Nos. 26-CA-4991, 26-CA-5620, and 26-CA-5729 were relevant to the Decision and Order which had been issued at 218 NLRB No. 129. The hearing in the cases referred to began on October 28, 1975. On November 28, 1975, the Board issued an unpublished Order Granting Motion, "vacat-

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1 At the hearing, General Counsel made clear that the matters contained in paragraphs 11-14 of the complaint constituted only evidentiary pleading and not independent allegations of violative conduct, being covered by a settlement agreement which was not set aside by the Regional Director.

ing" its Decision and Order in Case No. 26-CA-5213 and, based on its conclusion that the "impact" on Case 26-CA-5213 of the matters being heard by me in Cases 26-CA-4991, 26-CA-5620, and 26-CA-5729 "must be considered," remanded the former case to me for further consideration in the light of my findings in the cases then being heard.[2]

Briefs were received from all parties on or about May 17, 1976.

Upon the entire record[3] and my observation of the witnesses, I make the following:

Findings

I. Jurisdiction

Respondent is a corporation with a place of business in Memphis, Tennessee, where it is engaged in the bottling and distribution of soft drinks. During the year preceding issuance of the October 8, 1975, complaint, Respondent purchased and received in Memphis

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2 Chairman Murphy dissented, holding that the impact on Case No. 26-CA-5213 of the cases pending before me should await assessment by the Board in the light of my Decision.

3 General Counsel has filed an unopposed motion to correct the transcript of proceedings. The motion is granted, with the exception of the changes requested at p. 24, l. 25; p. 200, l. 5; p. 318, l. 13; p. 559, l. 19; p. 587, l. 17; and p. 587, l. 19.

In addition, I correct the transcript *sua sponte* as indicated in Appendix A to this Decision.

products valued in excess of $50,000 directly from points outside of the State of Tennessee and sold and shipped products valued in excess of $50,000 directly to points located outside the State of Tennessee. As the answer concedes, I find that Respondent is now, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Respondent's answer denies that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196 (hereinafter sometimes "Local 1196"), was a "labor organization" within the contemplation of the Act prior to July 2, 1975. Based on evidence of record and appropriate inferences to be drawn therefrom, the Board's July 9, 1974, denial of Respondent's Request for Review in Case 26-AC-24, and the Board's rejection of this contention in its Decision and Order at 218 NLRB No. 129, n. 4, I conclude that Local 1196 is and has been, at all material times, a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. *The Context*

Labor-management problems began at the Memphis Coca-Cola plant with the December 31, 1973, merger of the International Union of United Brewery, Flour,

Cereal, Soft Drink and Distillery Workers of America ("Brewery Workers International") and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters International"). The merger resulted in the disappearance of the Brewery Workers International and the issuance of charters by Teamsters International to the former Brewery Workers International locals.

One such local was Brewery Workers Local No. 196, which had been certified as the bargaining representative of the production and maintenance employees at the Coca-Cola plant in 1968. On November 16, 1973, Teamsters International granted that local a charter redesignating it as Teamsters Local 1196. On November 17, Teamsters International sent a certified letter to Respondent announcing the prospective merger and requesting recognition of the new local.[4]

From the beginning, Respondent evinced a reluctance to deal with the new Teamsters local. On February 1, 1974, Local 1196 filed a petition for amendment of certification (Case No. 26-AC-23) which was

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4 Although Respondent's general manager Gassaway testified that Respondent did not receive the letter, that seems improbable, since an employee authorized to accept such mail had signed the postal receipt. At any rate, Respondent received official notification at least by January 1974, via a letter from Local 1196 advising of a change in business agents, and a personal visit by the business agent around January 15, 1974.

shortly thereafter withdrawn. Local 1196 then, on March 3, held an affiliation vote among the employees and, on March 8, filed a new AC petition (Case No. 26-AC-24). On March 11, the Regional Director and Respondent concluded a settlement agreement pertaining to events in January and February 1974 in which Respondent allegedly sought to induce employees to sign an anti-Teamster petition. Respondent opposed the latest amendment-of-certification petition on the grounds of irregularities in the procedure by which the employees had voted on the change in affiliation, relying primarily on the eligibility requirements for voting in the affiliation election. The Regional Director, on May 7, issued a decision amending the certification as requested. On July 9, the Board denied Respondent's Request for Review of that decision.

On August 19, the Region issued a complaint in Case No. 26-CA-5213, alleging that since May 7 (the date of the Regional Director's decision in Case No. 26-AC-24), the Respondent had been violating Section 8(a)(5) by refusing to recognize Local 1196. Since Respondent's answer indicated, *inter alia*, that its refusal was premised on its determination to test the amendment of certification, the General Counsel moved for summary judgment. On September 10, a decertification petition was filed (Case No. 26-RD-280); its dismissal by the Region was appealed to the Board by Respondent.

On June 30, 1975, at 218 NLRB No. 129, the Board issued a limited bargaining order, finding, "in view of the fact that only 81 employees in a unit of approximately 450 voted to approve affiliation with the Teamsters Union, and that subsequent to such election some 330 employees allegedly disclaimed any desire to be represented by the Teamsters Union,"[5] a question concerning representation had been raised; the Board therefore concluded that although Respondent had been obligated to bargain with Teamsters Local 1196 as the successor to Brewery Workers Local 196, that duty to bargain had expired on November 12, 1974, with the expiration of the 3-year contract between Respondent and Brewery Workers Local 196, and it ordered the reinstatement of the decertification petition "for further processing."

The complaint alleges, *inter alia,* that in January and February 1974, Respondent violated the Act by attempting to induce employees to sign a petition opposing the Teamsters; that in April and May 1975, it engaged in similar conduct; and that on June 6, 1975, prior to issuance of the Board's limited bargaining order of June 30, Respondent violated Section 8(a)(3) by discharging Magnolia Jackson. On July 7, 1975, the Teamsters called the employees out on strike, alleged in

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5 The Board here referred to certain documents proffered in support of the decertification petition.

the complaint to be an unfair labor practice strike. The complaint asserts that, during the strike, Respondent's agents violated the Act by various statements made to strikers, by discharging and/or discriminatorily refusing to rehire a striker, and by refusing to reinstate two strikers upon their unconditional requests for reinstatement. Finally, the Board's order of November 28, 1975, setting aside its Decision and Order at 218 NLRB No. 129 and consolidating Case No. 26-CA-5213 with the other cases, raises a question as to Respondent's duty to bargain under Section 8(a)(5).

B. *The Alleged Anti-Teamster Efforts in January-February 1974*

The complaint alleges that from about January 31-February 8, 1974, Respondent's agents made various unlawful efforts to induce employees to sign a petition opposing the Teamsters.

1. The statements to John Mills

John Mills, no longer employed by Respondent, was a steward for Local 196 in 1974. He testified that around January 31, 1974, at a time when it had become clear that the Teamsters intended to assert bargaining rights as the successor to the Brewery Workers, production manager Leonard Broyles told him that there would be a meeting in the office of personnel director W. D. Donaldson (it appears, although Mills' testimony is un-

clear, that Mills meant to testify that Broyles was relaying this news from Randolf Krone, a route salesman and also a steward). Mills left his work and went to the meeting, where he found fellow stewards Hudson Taylor, Randolf Krone, and Gary Powers.

At the meeting, at which Donaldson was not in attendance,[6] Krone told the other stewards of a petition opposing the Teamsters which he wanted them to circulate. Mills said he wanted no part of it.

As the stewards were leaving, Donaldson called to Mills and asked to speak to him. He told Mills that Krone had "come to him and told him about the petition and the reason he told him was because he wanted to use his office, and that's how he got to know about the petition." Donaldson called the petition "a good idea" and asked Mills' opinion. Mills expressed opposition. Donaldson said "it would benefit [Mills] in the future" if he assisted with the petition, and "if I help him, he would help me." He did not specify what he meant. Donaldson also said that if Mills mentioned the conversation to anyone, he would deny it.

On Monday, February 4, upon being told that Donaldson wanted to see him again, Mills caught up

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6 Respondent witness Hudson Taylor testified that Donaldson was present when the stewards first arrived, "but he gave us the office and he left." It was not uncommon for the stewards to hold meetings in Donaldson's office.

with Donaldson in the trophy room. Mills had been away from work on the preceding Friday, and Donaldson allegedly told him "that he would fix it."

On the following Friday, February 8, Mills' supervisor, Broyles, told him to go to Donaldson's office to pick up his paycheck (Friday was payday). This was unusual, since Broyles normally handed out the checks. In the office, Donaldson said that Mills had been called to sign his timecard, which a secretary brought in. Donaldson told Mills that he "had crossed" Donaldson, and asked if he thought "he was smart." Donaldson said he knew what Mills had told Teamster Local president William Maxwell at a union meeting earlier in the week.[7]

In a long discussion, Donaldson asked who Mills would go to if he had to borrow money, asked Mills if he wanted his sons to have a college education, and asked if they could manage an education on a wage of "$2.30 an hour or $7.00" (Mills was then earning the former figure). Donaldson further mentioned that Mills could have been fired, instead of suspended, when he was earlier caught drinking on the job, and also stated that he could have Mills jailed for a year on a dope charge, even if Mills eventually proved his innocence. Donald-

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7 Mills testified on cross that at a union meeting "on a Wednesday after the petition" was filed, he told Maxwell what Donaldson had said to him. The petition in Case 26-AC-23 was filed on Friday, February 1, 1974.

son said it would be best if Mills did not attend a forthcoming Teamster meeting. He further said that although he could fire Mills, he would not, but that he would not forget what Mills had done. In the check he received that day, Mills was not paid for the Friday he had missed.

Randolf Krone testified that, after the employees had not been afforded a vote on the merger,[8] he "conceived this idea of getting a petition and use it to try to help us get a vote on what the people wanted to do." A number of employees had expressed concern about a dues increase announced by the Teamsters. On March 4, he gave to Donaldson a petition, consisting of several page headed "I do not wish to join the Teamsters Union," which he had gathered in the last week of January and the first week of February[9], having given copies of the blank petitions to the other five stewards, and two other employees, for circulation among the employees. He testified that he had delayed giving the petitions to Donaldson because Teamster Local president Maxwell told him, on February 5, that it was illegal to circulate the petition. On cross, however, Krone conceded that he made no mention of this reason when he was questioned on the same subject at

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8 The affiliation vote was not held until March 3.

9 On cross, Krone conceded that no signatures were gathered until February.

the AC hearing on March 24, 1974. Krone further stated that he did not discuss the petitions with any member of management prior to his presentation of them to Donaldson on March 4.

Krone recalled a meeting around the end of January with Mills and Taylor in Donaldson's office, but could not recall who else attended or what was discussed. He "believed" that he called the meeting and asked Donaldson for the use of his office. He did not "recall" telling Donaldson of the purpose of the meeting. He recalled that Donaldson was present when they entered, that they asked him to leave his office, and that he did so. He further remembered that Mills "got mad for some reason and left the meeting" but could not "remember for what reason he got mad." The others left about 5 minutes later.

Hudson Taylor, who attended the January 31 meeting, testified that Mills left the meeting 15-20 minutes before the meeting ended because "he didn't agree with what we was talking about."[10] While the other stewards were leaving later on, Taylor saw Donaldson approaching the office.

Donaldson testified that he was present as stewards Krone, Powers, Mills, Taylor and Money assembled in

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10 Taylor could not recall much about what they were "talking about." In other respects, he seemed to remember only matters important to Respondent's case. Taylor's attorney appeared to be generally unreliable.

his office on January 31, and he then left to go to the payroll office. He was talking to a new applicant when he saw them depart some 20-30 minutes later. He denied speaking to Mills about a petition that day. Donaldson further testified that the reason he called Mills in to sign a duplicate timecard was that Mills' original card had been lost, and it was necessary to execute a duplicate. He believed, but was unsure, that it was on this occasion that Mills offered to give him a petition "about the Teamster Union," which Donaldson refused to take. Donaldson denied asking Mills to solicit signatures on a petition.

Mills, while slow and inarticulate, gave a solid impression of honesty. His occasional memory lapses were, I think, a product of the passage of time between the events testified to and the hearing. The duplicate timecards for Mills in evidence are rather complicated to analyze, but they, together with Donaldson's unconvincing testimony about them, appear to support Mills' testimony, particularly the temporarily "lost" original timecard which carries a scratched-out, but discernible, notation to "pay 8 hours" for the Friday that Mills had been absent. The implication is that, at one point, the payroll office had been instructed to pay Mills for his day of absence and that this instruction was rescinded after Donaldson found that Mills had informed the union meeting of Donaldson's prior efforts to cajole him into circulating the petition.

On the credited testimony of Mills, I find that Respondent's agent Donaldson violated Section 8(a)(1) of the Act on January 31, 1974, by urging Mills to assist Krone in soliciting employees to sign an anti-Teamster petition and by offering to "help" Mills if Mills would "help" him. I further find that Donaldson violated Section 8(a)(1) on February 4 by telling Mills that he would "fix" Mills' absence on the preceding Friday, clearly part of Donaldson's continuing effort to secure Mills' assistance in the petition effort. Similarly, Donaldson violated the Act on February 8 by telling Mills that the latter has "crossed" Donaldson by revealing the content of their earlier conversation at the union meeting; this declaration not only constituted an implicit threat but, as well, conveyed an impression that the union activities of the employees were under surveillance.[11] Donaldson's further statements to Mills on February 8 regarding the potential source of funds which Mills might want to borrow, and the possibility of Mills' children going to college, conveyed mingled threats of retaliation and promises of benefits, and the references to Mills being discharged or sent to jail on a narcotics charge obviously would have tended to restrain Mills in the exercise of his Section 7 rights, as would Donaldson's cautionary statement that it would be best for Mills to refrain from attending a forth-

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11 Although the complaint contains no allegation of an impression of surveillance, the conversation was fully litigated as an evidentiary matter, and I see no reason why such a finding may not be made.

coming Teamsters meeting and that he would not forget what Mills had done. I find the foregoing comments violative of the Act.

2. The statements to George Money

George Money, in Respondent's employ at the time of the hearing, was a steward during January and February 1974. On February 6, 1974,[12] he was called to the office of then production supervisor Broyles, who told him that Krone was passing around petitions — "something about the Teamsters Union" — and asked Money to see Krone about getting one. Broyles said, "I don't know what all this mess is about, he said, I don't know why, but the company doesn't want the Teamsters Union in."

Later that day, Money saw Krone and asked "what kind of petition he was passing out." Krone took a piece of paper, wrote on it "I do not wish to join the Teamsters Union," and, handing it to Money, asked him to secure employee signatures.

The following morning, Broyles asked if Money had obtained any signatures, to which Money replied in the negative, and Broyles "immediately asked me why I don't get out of the union." Money said he "couldn't turn his back on the union," but would give thought to

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12 So Money testified after being refreshed by his affidavit. Other testimony of his suggests a date of a few days earlier.

the matter. Broyles said "you need to get out because you making more money now than you ever made in your life."

Broyles denied ever discussing a petition with Money.

Money was a straightforward and honest witness, whose apparent minor deviations from his 20-month old pretrial affidavit were understandable or, upon close scrutiny, nonexistent.[13]

I did not consider Broyles to be a particularly impressive witness. I credit Money's testimony, and find that Respondent violated Section 8(a)(1) of the Act when, in early February, Broyles asked Money to assist Krone in soliciting signatures on an anti-Teamster petition and when, on the following day, Broyles asked Money why he did not "get out of the union."

3. The statements to Magnolia Jackson

Magnolia Jackson testified that on February 5, as she was entering the plant, employee Ivory Harris showed her a petition stating "I don't want to have to join the Teamsters Union," mentioned the name of warehouse

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13 In arguing that Money should be discredited, Respondent relies heavily on Money's pretrial affidavit, in evidence as General Counsel's Exhibit 10. My review of the document indicates to me that it was awkwardly drawn, and its peculiar structure is explicable.

supervisor Rapp, and said that since Jackson was a steward, she was supposed to get signatures on the petition. Jackson said that "if Rapp wanted the petition carried around and signed, for him to carry it around and sign it himself."[14]

Later that day, supervisor Broyles told Jackson to go to the front office, where "someone wanted to see me." There she found Krone, holding one of the petitions. Jackson said she did not want to sign because she was in favor of the Teamsters; however, she agreed to tell other employees about it.

The following morning, Jackson got a similar message from Broyles, and she again found Krone awaiting her. He sought her opinion on meeting with the Respondent to "get their side about how they felt about the union." She expressed disinterest. Krone said that if such a meeting were to take place, a letter would have to be signed by the stewards requesting such a meeting.

Later that morning, after again being sent up front by Broyles, she again found Krone. This time he had a letter addressed to management stating that the stewards wished to meet with the company. Jackson said she would attend the meeting, but would not sign the letter.

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14 As I ruled at the hearing, I am not considering any hearsay contained in Jackson's testimony as to what Rapp allegedly told Harris.

That afternoon, by the same procedure, Krone again asked her to sign the letter, saying that he had talked to Donaldson about the meeting. Jackson refused to sign.

Later in the afternoon of February 6, the six stewards attended a meeting in one of the offices. Present for Respondent were Donaldson, Richard Brackhahn, Respondent's attorney, and Brooks Gassaway, Respondent's vice president and general manager. There is conflict in the testimony of Money, Mills, and Jackson as to the statements made by Respondent's representatives at the meeting; I think Money and Mills misunderstood the thrust of the remarks. Jackson testified to an innocuous discussion in which Respondent's agents said that "until the Labor Board gave a ruling, they would continue to deal with the AFL-CIO."[15] Gassaway said that the Respondent would continue to apply the existing contract. There was discussion about the legality of the merger, and "someone" mentioned a company which had been dynamited by the Teamsters. The question of escrowing the dues then being checked off was, the record indicates, discussed. During the meeting, Jackson said "the people had lost confidence in the company."[16]

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15 As noted, the petition in Case 26-AC-23 had been filed by the Teamsters on February 1, 1974. Gassaway showed the employees a copy of it at the meeting.

16 I do not understand the complaint to allege that any unlawful statements were made at this meeting nor, based on the relevant testimony, do I think any coercive remarks were made. Although I believe that the meeting was arranged at the initiative of the Respondent, I think its intent and effect were to inform the stewards of the existing legal situation.

The following day, February 7, Donaldson called Jackson to his office. He expressed concern about her statement that the employees had "lost confidence" in Respondent. He asked about their problems, and she described some grievances. Donaldson said he had met with Gassaway earlier, and Gassaway had expressed his admiration of the way Jackson had spoken out at the meeting. Donaldson praised Jackson, and noted his surprise at her relatively menial position.[17] He asked her salary, and compared it to "seven or eight that I could be making." He asked if she thought she had the capacity to be a supervisor, adding that he was not offering her such a job. Donaldson then told her to stop letting people use her, describing his own experience and the rewards of his own career efforts.

The next day, Jackson was again summoned, after work, by Broyles to see Donaldson, who said he had looked into some of the grievances she had mentioned. He also asked if she had reflected on their conversation of the day before. She had. He told her that he had known of Teamsters local president Maxwell in the past, and that Maxwell was "not for real" and was "misleading you people."[18] He then said that certain prospective changes in the managerial ranks might put him

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17 Jackson was a bottle inspector.

18 Maxwell testified that the first time he had actually met Donaldson was in January 1974. However, this testimony does not contradict the thrust of Jackson's testimony, which was that Donaldson knew about Maxwell prior thereto.

"in the position to do better things for me," although he "wasn't making any promises." Donaldson repeated that Jackson should not let herself be used. Broyles had told her to keep track of the time spent with Donaldson so that she could be paid for this after-hours meeting; before she left the office, she asked Donaldson for the time.

Donaldson was not asked about these conversations with Jackson on February 7 and 8. Even though, *infra*, I discredit Jackson's testimony with respect to her version of the events leading to her discharge on June 6, 1975, I have no reason, especially in view of Donaldson's silence on the matter, to reject Jackson's detailed and not improbable description of Donaldson's statements to her in February 1974.

It is clear that Jackson's reluctance to sign the letter calling for the February 6 meeting, and her statement at that meeting that the people had "lost confidence" in the company, marked her as a supporter of the Teamsters. That she was so regarded is indicated by Donaldson's repeated admonitions that she should not let herself be "used" and by his disparagement of Maxwell. By discussing her potential for supervisory status and the changes in staffing which might put Donaldson "in the position to do better things for me," Donaldson was plainly attempting, by promise of benefit, to wean Jackson away from the Teamsters; and by warning that she should not allow herself to be "used," he was, with

equal clarity, threatening her that assistance to the Teamsters would be looked upon with disfavor. By these comments, Respondent violated Section 8(a)(1).

4. The conduct of Randolf Krone

The complaint alleges that Randolf Krone, acting as Respondent's agent, solicited employee signatures, and induced stewards to solicit such signatures, on anti-Teamster petitions in February 1974.

Krone was a route salesman and one of the six Brewery Worker stewards. There is no question that Krone circulated petitions in February 1974 and urged other stewards to do so. The issue of whether Krone did so as agent for Respondent is the matter in dispute.

Krone testified that the petitions were his own idea, and that he received no encouragement from management. The credited testimony of Mills shows, however, that on January 31, Donaldson was aware of Krone's intention to circulate a petition and that Donaldson characterized the petition as something of personal and direct benefit to himself, saying to Mills, as Mills testified, "if I help him, he would help me." Thereafter, as the credited testimony of Mills and Money indicates, Donaldson and Broyles applied pressure to involve them in the petitions being circulated by Krone. The record further shows that Krone was given the run of the plant, as he virtually con-

ceded, to consult with other stewards and employees about signing the petition, on working time and in work areas, both his own and those of the other employees.[19] Respondent's is a tautly-run operation; there is no other inference possible from this record, and supervisor Broyles' testimony, as well as existing company rules, support this conclusion. Despite this, it is evident that Krone was afforded free rein to walk up to employees while at work to solicit their signatures on his petitions. It is impossible to believe that he was not noticed by the omnipresent supervisors, and, on this record, it is difficult to conceive that he would have been permitted to do so had he been on any other mission.

That Krone was working hand-in-glove with Respondent is reflected by the evidence relating to the February 6 meeting between the stewards and Respondent's agents. There is considerable testimony in the record bearing on whether the meeting was generated by Krone acting independently, as he testified, for the purpose of discussing the confused union situation, or by the company, acting through the conduit of Krone. Before the meeting took place, it is clear, Krone was running back and forth between the stewards, on the one hand, and Donaldson and Gassaway, on the

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19 Mills credibly testified, *inter alia*, that on February 6, both Krone *and* Steward Hudson Taylor (who testified for Respondent) approached him at work to urge that he sign the letter requesting a meeting with Respondent's representatives.

other, trying to arrange things. Certain evidence suggests to me that Respondent instigated the meeting. Gassaway testified that the Respondent decided around January that the proper disposition of checked-off dues would be to deposit them in an escrow account until the representation situation was clarified, "but we also made up our minds that we shouldn't do it without consulting with the stewards." Since the matter of escrowing the dues was first raised at the February 6 meeting, and the escrow account established thereafter, it seems likely that the initiative for the meeting — for the purpose, *inter alia*, of "consulting with the stewards" about the escrow — came from Respondent.

Krone's testimony as to the source of the idea that the stewards should sign a letter asking Respondent to meet with them was suspiciously inconsistent. At first, he testified that either Donaldson or Gassaway agreed, at Krone's insistence, to have a meeting, but on one condition: "he said if we got up a written request and had all the shop stewards, you know, sign it, that we could, you know, have the meeting; because they had matters before the Labor Board, or something to that effect." This makes sense. Subsequently, however, Krone attributed the idea to himself, saying that when Donaldson at first told him they could not meet, "I asked him could we get up some kind of an agreement or something to meet with him and Mr. Gassaway"; ". . . it was not Mr. Donaldson's idea . . . it was my idea."

All things considered, I think the evidence plainly shows that Respondent sponsored, encouraged, aided, and abetted the circulation of the Krone petitions in a manner violative of Section 8(a)(1).[20] *Placke Toyota, Inc.*, 215 NLRB No. 66, sl. op. p. 3, and cases cited at n. 7; *Condon Transport, Inc.*, 211 NLRB 297, 300-302.[21]

C. *The Alleged Violations in April-May 1975*

1. The interrogation of Charles Short

Charles Short, on strike at the time of the hearing, testified that in December 1974, production super-

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20 The complaint does not allege, and the record does not indicate, that Respondent initiated the circulation of the petition. Mills' testimony — that Donaldson told him that Krone had approached Donaldson and "told him about the petition" — suggests that the concept of the petition began with Krone, rather than with Respondent, and that Respondent then embraced it and assisted its circulation.

21 The conduct in January and February 1974 found to be violative above was, as indicated, comprehended by a settlement agreement which was approved by the Regional Director on March 11, 1974, and set aside by him in the consolidated complaint issued on October 8, 1975. While Respondent argued at hearing that the Director's right to void the settlement agreement was time-barred, it makes no such contention in its brief. Since I hereafter find that Respondent engaged in several violations of the Act subsequent to execution of the settlement agreement, the agreement was properly set aside, under established doctrine which permits such action "when there has been a breach of the agreement, or when there has been a subsequent independent violation of the Act by a party to the agreement," *N.L.R.B.* v. *Southeastern Stages, Inc.*, 423 F.2d 878, 880 (C.A. 5), and cases cited.

visor James Wimbley asked him to sign an anti-Teamster petition, which he did not do.

In the first part of April, 1975, while on the night shift, Short spoke to Wimbley about splitting his vacation. Wimbley said to call him the next morning. He did so, and was told to call in the afternoon.

When Short called again, Wimbley said, "Oh, yes, Charles, you are strongly involved in this union," and he "asked me what I had to say about it." Short said nothing.[22] Wimbley then said something about "hav[ing] this piece of paper here," which he did not identify, and Short cut him off by saying "Well." Wimbley told Short to see Donaldson when he came in to work.

When Short did so, Donaldson told him that no employee could have a split vacation. The following week, Short broached the subject with a supervisor named "Willie Broyle" (probably production manager Leonard Broyles), and Broyles arranged for him to split his vacation.

Wimbley testified that all requests for changes in the vacation schedule are referred to Donaldson. He said Short called him in the spring of 1975 to ask about splitting his vacation and that he told him to contact Donaldson. Neither the Teamsters union nor peti-

22 Short signed a Teamster card and attended union meetings at unknown times.

tions were mentioned; in fact, Wimbley testified, he has never talked to Short about a union.

I was not comfortable with Short's testimony. Although he said that Wimbley had asked him to sign a petition in the "first or second week of December," there is no other evidence in the record that petitions were being circulated at that time. There appears to have been no real basis for Wimbley to have accused Short of being "strongly involved" in the Union. In sum, I cannot conclude that during the first week in April 1975, Wimbley unlawfully interrogated Short about his union sympathies. Even if I were to credit Short, furthermore, I would not find that Wimbley's cryptic reference to "having this piece of paper here" constituted a solicitation of Short to "sign a petition opposing the Union," as the complaint charges. I recommend dismissal of the allegation relating to Short.

2. The solicitation of Peng Kones

Peng Kones, on strike at the time of hearing, testified that probably in late June 1975,[23] warehouse supervisor Alvin Truelove called him into his office during the middle of Kones' shift. Employees Al Cotton and Walter Williams were present. Truelove asked him to "sign a paper" which Truelove had, the contents of which Truelove did not identify. Kones cannot read. Kones said he would stop by the office on the following day and sign it.

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23 Kones' pretrial affidavit gives the time as "April or May."

He went to the personnel office the next day and said Truelove had sent him. A woman told him that the purpose of the paper was "to sign out of the union," and "I wasn't intending to get out of the union so I didn't have no paper to sign."

Judy Morgan and Jane Byrd, the two personnel clerks,[24] denied ever having a conversation with Peng Kones about a union, or having had in their possession any papers relating to withdrawal from a union. Alvin Truelove and Walter Williams denied Kones' testimony, and Williams denied the existence of anyone named "Al Cotton."

Kones' testimony was, as shown, decidedly vague. His demeanor was not overwhelmingly impressive, even taking into account his obvious lack of education. I find it difficult to ground, on this unclear testimony, a conclusion that the law has been violated. I shall recommend dismissal of this allegation.

D. *The Discharge of Magnolia Jackson*

The complaint alleges that Magnolia Jackson was discharged on June 6, 1975, because of her activities on behalf of Teamsters Local 1196 or other concerted activities.

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24 There is only one other female employee in the personnel office, which is separate from the plant. She is the payroll clerk, and has no direct dealings with employees.

Jackson was first employed by Respondent in October 1968. At the time of discharge, she was a bottle inspector. Her activities as a union steward, and her evident support of Local 1196 in early 1974, have been previously described.

On November 25, 1974, while the General Counsel's motion for summary judgment on the Section 8(a)(5) complaint and the appeal of the Region's dismissal of the decertification petition were pending before the Board, Jackson posted a notice on the plant bulletin board announcing a "Union Meeting" for all union members at the Teamsters union hall. For doing so, Respondent's personnel director Donaldson issued to Jackson a "Notice of Work Rule Violation," accusing her of "Posting unauthorized material on bulletin boards," and he inserted in her personnel file a memorandum stating, "This letter should serve as *final warning* that any further violation of Company Policy by this employee will result in *immediate* dismissal" (emphasis in original).

Donaldson testified that the gravamen of Jackson's offense was that the posting violated the provision of the Brewery Workers' contract permitting Local 196 to post only "noncontroversial notices" after securing permission.[25] Donaldson stated that Teamster notices

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25 Article XXI of the Brewery Workers' contract had provided: "Upon application, the employer shall allow noncontroversial union notices to be posted on bulletin boards."

were "considered controversial notices," and that similar notices had been removed by Respondent, whenever found, since January 1974. Although the notice mentioned the Teamsters only by stating that the "Union Meeting" would be held at the "Teamsters 667 Union Hall," Donaldson testified that such reference made the notice "controversial." He gave, as another reason for removing the notice, that it had been posted without permission.

The credited testimony of Jackson and Mills is that, while serving as Brewery Workers stewards, they had never been required to secure permission in order to post union notices. The further credited testimony of Mills and Stephen Baiel[26] is that supervisors Broyles and Cocke had seen them post Teamster notices in 1974 and that, while the notices were subsequently removed, the employees were not admonished. It thus appears that Jackson was the only employee to be disciplined for posting Teamster notices which, by definition, were deemed "controversial." It should further be noted, that, although Donaldson testified that he issued the warning because of the rule "defined in the collective bargaining agreement," this incident occurred at a time at which the contractual regulation of posting had expired with the contract on November 12, 1974, some 2 weeks before.[27]

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26 Whose affidavit was received, without objection, for the truth of the matters asserted therein.

27 This incident was made the subject of a settlement agreement which was not set aside by the present complaint, and is adverted to here for background purposes only.

Jackson testified that when this incident occurred in November 1974, Donaldson called her in and said he was "sick and tired," having been in court the past few weeks for "just things of that sort." He told her, pointing to the expired contract, that she had not received permission to post the notice. He said she "was the only one in the plant causing trouble," and she replied that if fighting for the Union was "causing trouble," she would be continuing to cause trouble. Donaldson gave her the warning slip for posting the notice, which she refused to sign. He mentioned having heard that she had started some trouble in the production area a few days before, and told her that if she posted any more notices or "any supervisor ever came to him with anything I had done, he was going to fire me." In response to her query, "Without even hearing anything I have to say about it?," he said that was correct. Further acrimony followed, in which Donaldson suggested that she quit, a resolution which, since that "would make him happy," she refused to do. She said she would prefer that he fire her, and he said, "That's what I'm going to do, I'm going to fire you." Donaldson did not testify about this meeting. I credit Jackson.

In 1974 and 1975, Jackson also received other notices of violation. Prior to the November 1974 incident, on August 8, 1974, warehouse supervisor Oscar Rapp had seen Jackson drinking a bottle of Coca-Cola, evidently taken from the production line, which was forbidden. There was a confrontation with Jackson, and Rapp told

Jackson's supervisor, Wimbley, about the incident. Wimbley, with Rapp cosigning, wrote Jackson up for "unauthorized use of company materials" and "insubordination toward supervisor when confronted with violation." On December 16, 1974, Wimbley gave Jackson a written notice for returning late from lunch.[28] On April 1, 1975, Wimbley and Collins, another supervisor, gave Jackson a written warning for reporting to her station 5 minutes late.

In April 1975, as Donaldson and Jackson testified, Jackson presented to plant manager Miller, warehouse supervisor Rapp, and Donaldson, a petition drawn up by her and signed by 70 employees, urging the removal of supervisor Wimbley. As a result, Respondent interviewed most of the signatories, and thereafter Respondent's president, George R. Pidgeon, issued a notice to employees expressing "the greatest confidence in Mr. Wimbley and each of you." Wimbley was not removed from his position.

Jackson was discharged by Donaldson on June 6, 1975. There is, as usual, a conflict of testimony as to the events precipitating her discharge.

Wimbley testified that he saw Jackson that morning, at about 8:15, leaving the production area and heading

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28 Since Jackson was the bottle inspector, I assume the production line could not start without her.

toward the break area. He asked if she was on a break, a question which he "routinely" put to nonworking employees. She said that she was, but that it was "none of [his] damn' business." He asked what was wrong. She replied that she was "sick and tired" of his attitude[29] toward the employees, and was "not going to rest until the got the company to fire my damn' ass." Wimbley told her to report to Donaldson's office immediately, and he then called Donaldson to report Jackson's "utilization of profane language" toward him. He did not pinpoint for Donaldson the language used. He told Donaldson he was "sick and tired" of her attitude toward him. Jackson departed in the direction of Donaldson's office, but several minutes later, according to Wimbley, he saw her heading in the wrong direction. He asked her why she had not gone to Donaldson's office, and she said, "I'm going to Mr. Miller's office. I'm not about to go and see that idiot in personnel."[30]

Wimbley ordered her again to go to Donaldson's office, and he called Donaldson to acquaint him with this latest incident, telling Donaldson that he was "sick and tired of her insubordinate attitude." He also allegedly told Donaldson in this second call what Jackson had said to him earlier concerning his "damn' attitude"

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29 In subsequent testimony, Wimbley changed this to his "damn' attitude."

30 Miller, as indicated, was the plant manager.

toward the employees, and about her reference in their second encounter to "that idiot in personnel."[31]

Donaldson, called as an adverse witness by General Counsel, testified that he discharged Jackson because "she was disrespectful and insubordinate to the production supervisor and myself." He said that Wimbley called him at about 8:30 on June 6 and told him that Jackson had "used profane language and had been very insubordinate to him." Ten minutes later, Wimbley called again to report that Jackson had disobeyed his instruction and had stated that she said she was "going to see Mr. Miller before she went to see that idiot down in personnel." When Jackson arrived in his office, Donaldson was occupied with supervisor Rapp, and asked Jackson to have a seat. After a minute, she told him she "didn't have time for this foolishness, that she had to get back up on her job." He told her to sit down, and that she would receive the same wages no matter what she was doing.

Shortly thereafter, he called Jackson in and asked "what the problem was with her and Mr. Wimbley."

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31 Wimbley's testimony on direct, and his pretrial affidavit, given on June 18, 1975, brought out only that he told Donaldson in the second conversation that he had found Jackson heading for Miller's office and had ordered her to see Donaldson. On cross, however, when probed, he affirmed that he had told Donaldson, in the second conversation, the specifics of "what Mrs. Jackson had told [him]" in both encounters. It might be argued that Wimbley felt compelled to amplify his affidavit in order to conform to Donaldson's testimony, since Donaldson, previously called as an adverse witness by General Counsel, had testified that Wimbley had been that specific.

She said that she had no problem, that Wimbley was the sick one. Jackson denied having cursed Wimbley, but admitted to Donaldson that she had not come directly to Donaldson's office as instructed. Rapp, who had gone into an outer office, reentered at that time to pick up some papers. Donaldson, who "sensed Ms. Jackson had the attitude she did and talking in a loud voice," asked Rapp to stay. He inquired of Jackson whether she minded Rapp's presence, and she said she did not care "because he wasn't going to believe her either." Asked why she would make such a statement, she referred to a prior incident with Rapp about his complaint that she had stopped some truckdrivers from working. Jackson and Rapp discussed this incident.

Donaldson said that, from the beginning, Jackson spoke in "a very, very loud voice." He asked Rapp to close the door because there were new applicants outside.[32] Jackson stood in front of Donaldson, shaking her finger in his face and telling him that the supervisors did not know what they were doing. Probably at this point, Rapp told her that the supervision had been changed twice to satisfy the employees, and Jackson retorted that there would be "another change before she was through." Donaldson asked her to confine herself to what had been said between her and Wimbley. Jackson said that they were only going to believe what they

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32 Jackson testified that there were people sitting outside.

wanted to, that it was "just like that last Board decision, that they believed that whitey Wimbley instead of me."[33] Donaldson asked if she was insinuating "crooked relations" between Respondent and the Board, and Jackson answered affirmatively. At some point, Jackson said that Respondent was working the employees too hard. Donaldson on three occasions asked Jackson to calm down and offered her a seat outside in order to consider apologizing "[f]or calling me crooked and telling me — just being an outright belligerent unruly employee."

On examination by Respondent, Donaldson added that Jackson had also told him "you can fire me if you dare," and that she "had other people who could take care of her problems for her and that I had not heard the last of this."

Warehouse supervisor Rapp gave testimony which substantially supported that given by Donaldson.

Personnel clerk Jane Byrd testified that she saw Jackson in Donaldson's office between 8:30 and 8:35 on the morning of June 6, and shortly thereafter, back in her own office, heard a woman's voice emanating from Donaldson's office for several minutes. She referred to the voice as "loud" and the noise as a "commotion."

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33 A few days before, the Region had secured withdrawal of a charge filed by Jackson against Wimbley.
Wimbley is, in fact, a black man.

Roy Hill, a supervisor who had retired at the time of the hearing, testified that on June 6, at about 8 or 8:30, he saw Jackson pass his office. He came out of his office, on his way to another office, and stopped to get a drink at a Coca-Cola machine; Wimbley and Jackson were talking a few feet away. Hill heard her say that she "was going to see Mr. Miller, that she wasn't going to see that idiot." Wimbley told her to go to the personnel office immediately. Hill walked off, leaving the two there. A week later, when Donaldson told him Jackson had been terminated, Hill told Donaldson about what he overheard. On June 18, 1975, Hill gave a statement to the Board regarding the matter.

Jackson's version was markedly different. On June 6, according to Jackson, she was on her way to a rest break around 8:30 a.m., when Wimbley said to her, "Mrs. Jackson, since your first try at getting rid of me, I heard that you've got something else in mind in getting rid of me." Jackson replied, "Well, Mr. Wimbley, I heard a lot of things about what people have planned for me, what's going to happen to me, and that doesn't necessarily make it true." Wimbley thereupon told her to go to Donaldson's office, but refused to give a reason for the order. She then went to the ladies' room and then directly to Donaldson's office. She denied Wimbley's testimony that he had caught her heading for Miller's office and, of course, denied having referred to Donaldson as an "idiot."

When she arrived, Donaldson was busy with Rapp, and he told her to sit down outside. She complied. After being called into Donaldson's office, he asked what the problem was with Wimbley; she said it was Wimbley's problem, not hers. Donaldson said Wimbley had told him that she had "cursed him out," which she denied.[34] She then acquainted him with her version of the occurrence between her and Wimbley. She also told Donaldson that employee Everett Blaine had been standing nearby at the time.[35]

Rapp reentered the office. Donaldson told her Wimbley had "also said I had been insubordinate to him." She said that Rapp had used that same word when she had received a warning for drinking a bottle of Coca-Cola. She and Rapp fell to discussing the incident in which she had been accused of delaying the work of other employees, which she denied; Rapp said "whichever way it was, I had spoken sharp to him."

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34 On cross, Jackson testified that she and Donaldson also argued about who had stopped who first.

35 On cross, Jackson said Blaine was "5 or 6 steps" away, and that she "might have" told Donaldson that she "didn't know" whether Blaine could have overheard the conversation. Blaine was standing near the palletizer, a noisy machine. Jackson told the Board agent that "there was a lot of noise." Since her pretrial affidavit, given on June 6, states that Blaine had asked her "what Wimbley was getting on me about," and that she told him the details of the conversation, there is no explanation why she might have indicated to Donaldson that Blaine could even possibly have overheard the conversation. The affidavit also states, "I don't know of anyone who heard us talking."

Donaldson then said he would not tolerate profanity and insubordination to the supervisors from her. When she denied such conduct, he said she must have done "something to make Mr. Wimbley so upset," and Jackson said she knew he was not going to believe her, just as he had believed Wimbley over the 70 employees who had signed the anti-Wimbley petition. He told her that he had expressly called her in to hear her side of the story. She said "there was something wrong somewhere, that Mr. Wimbley was undoubtedly wrong." Donaldson then "asked me was I telling him the company was crooked and he was crooked."[36] She said she had not used the word at all, but had simply said something was wrong. Donaldson persisted: "Do you mean to sit here to my face and tell me I am crooked and the company is crooked?" She denied having so alleged, but Donaldson said "he was giving me a chance to explain what I meant by him being crooked and the company being crooked." Donaldson had begun writing out a dismissal slip as they talked. At some point, Donaldson said she was being fired for being "insubordinate to him." He called Wimbley to have a female supervisor escort Jackson to the dressing room to clean out her locker. She was discharged as of that day. The discharge slip gave as the reason, "Disrespect and insubordination toward personnel director and production supervisor."

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36 On cross, Jackson said she told Donaldson, "Somebody is upholding Mr. Wimbley in his wrongdoing and upholding his mistreating of employees," to which Donaldson responded by asking if he was being accused of being crooked.

Jackson denied having stood during the interview. While she also denied having alleged "crooked relations" between Respondent and the Labor Board, she added, on cross, a new element — that after she made the statement about "the upholding of Mr. Wimbley," Donaldson remarked "something about the National Labor Relations Board decided favorably to the company." She told him "that when I came to the Board I had told the truth, that I didn't know what the company had said," and that "the company wasn't going to do anything in a way whereas there would be any evidence filed against them for being wrong." Jackson denied that Donaldson had offered her a chance to sit in the hall to cool off. She testified that it was Donaldson who first brought up the subject of the Board; however, she at the same time attributed to him the statement that "he didn't want to get into anything about the Board and the company and the business."

Jackson is an intelligent and articulate person; nonetheless, I do not believe that the events of June 6 transpired as Jackson related them. Aside from internal problems in her testimony, I find the scenario a bit hard to digest.

One would have to conclude, if Jackson's version was credited, that a major conspiracy was being played out: Wimbley stopped her for no reason and then, equally for no reason, sent her to Donaldson; then Donaldson picked up the ball and discharged her for no reason. First of all, the logic of the situation does not lend itself to such an elaborate scheme; on June 6, 1975, the par-

ties were waiting for the Board's ruling on General Counsel's motion for summary judgment in the refusal-to-bargain case; at the time, it would have appeared to most observers that the Respondent's opposition to the motion constituted an effort to test the Board's earlier ruling, in the AC case, adverse to Respondent, and that Respondent would continue to refuse to bargain by taking the Board's anticipated bargaining order to a court of appeals. There was no apparent fervor of union activity at this time, and no particular reason for Wimbley and Donaldson to concoct a plot to rid themselves of Jackson.

Furthermore, in addition to the concessions and contradictions made by Jackson upon cross-examination, noted above, which seem to support Donaldson, I also found convincing the eye-witness testimony of Oscar Rapp, who is either an excellent amateur thespian or who related the incident as he truly recalled it.[37] I also found credible the testimony of Jane Byrd, who, from some distance, heard Jackson speaking in a "loud" voice through the closed door of Donaldson's office, and of retired supervisor Roy Hill, who heard Jackson say she was going to see plant manager Miller rather than that "idiot."[38]

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37 Rapp testified that he was attempting to "relive" the incident, and I believe that he did, to the best of his ability.

38 One of Jackson's affidavits contained an admission that she had once refused an order by supervisor Collins to go to Wimbley's office because she was "on a break," and she testified that on another occasion, Wimbley had told her to come to his office, and she had gone to see Miller first. There is no particular reason to believe that she did not act similarly on June 6.

I believe, nonetheless, that Jackson's concerted activities played an influential role in her termination. Respondent points out that Jackson and others had been bombarding the Regional Office with charges prior to June 6, and that Respondent must have had substantial justification for the discharge of Jackson, knowing full well the inevitability of a Board investigation of such an action.[39] I do not doubt that Respondent would have been aware that such an investigation would necessarily follow, and indeed my factual findings are premised to some extent on the likelihood that, because of the certainty of the anticipated limelight, Respondent did not fabricate its version of the events out of wholecloth.

The fact is, however, that Jackson was a most irritating thorn in Respondent's side. She was a known supporter of the Teamsters, apparently the only one who had received a written reprimand for posting a

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I note that General Counsel may be subconsciously intimating something less than total conviction about the accuracy of Jackson's testimony. While his brief eventually argues that her version should be credited, the first part of his argument as to Jackson relies on an analogy to *Finesilver Manufacturing Company*, 220 NLRB No. 90, in which the Administrative Law Judge credited the Respondent's witnesses but nonetheless found a violation.

39 At the hearing, Respondent offered a batch of charges filed against Respondent between July 11, 1974, and January 7, 1976, which I rejected *in toto*. Inasmuch as my examination of those charges discloses that Jackson personally filed charges on November 29, 1974, January 17, 1975, April 2, 1975, and April 30, 1975, they appear to be relevant; I reverse my ruling and receive into evidence Respondent Exhibit 26.

Teamsters notice on a company bulletin board. She had filed four charges against Respondent between November 1974 and April 1975. In November 1974, according to her uncontradicted testimony, Donaldson had told her that he was "sick and tired" of the situation; that she was "the only one in the plant causing trouble"; that "if any supervisor ever came to him with anything I had done, he was going to fire me"; and that, when Jackson refused to resign, saying that she would rather that Donaldson fire her, he said, "That's what I'm going to do, I'm going to fire you." In April 1975, Jackson had presented Respondent with a petition signed by 70 employees protesting Wimbley's treatment of employees, prompting a process of interviewing the employees to ascertain the complaints.

This consistently annoying pattern of conduct surely offended Respondent, and made Jackson a prime target for elimination. That Respondent was searching for a plausible reason for discharging Jackson is strongly suggested by the testimony of Oscar Rapp. After describing the warning notice he and Wimbley gave to Jackson in August 1974 for drinking a bottle of the product and being insubordinate, Rapp mentioned that he then called Donaldson to tell him of the event. When asked, on cross, why he had called Donaldson, contrary to normal practice, Rapp said, confusingly, "Sir, I don't know at times how much involvement there is in any of these matters, and I don't know how serious some of them might be, and that's the reason I was call-

ing Mr. Donaldson to let him know about it." He eventually shifted the emphasis of his explanation for the call to the fact that Jackson was not in his department; however, Rapp and Wimbley had drawn up a written warning which presumably would be seen by Donaldson ("I would say the last reason I give was more practical, yes"). Finally Rapp said, "I don't know, it was just my thinking. I thought it should be discussed with the personnel department." I infer from all this that Respondent's supervisors understood the importance of making Donaldson cognizant of misbehavior by Jackson.

When Jackson was called into the office on June 6, 1975, I believe that she became unruly. But I also believe that much of her hostility was deliberately engendered by Donaldson, who saw an opportunity to provoke an already aroused Jackson. I can perceive no other explanation for the tortured introduction into the conversation of the claim that Jackson had accused Donaldson of being "crooked." According to Donaldson, Jackson said that Respondent would not believe her story, that it would be "just like that last Board decision, that they believed that whitey Wimbley instead of me," whereupon Donaldson asked if Jackson was "insinuating crooked relations" between Respondent and the Board.[40] This is a curious and contrived re-

40 To the extent that Rapp's testimony has Jackson being the first to use the word "crooked," it seems likely to me that Donaldson would not have, as he testified, spoken of "insinuating crooked relations" if Jackson had already used the term. I would rely on Donaldson's recall here.

joinder to Jackson's statement. The fact that the Region might have believed Wimbley rather than Jackson does not pointedly imply an unsavory relationship between the Board and the Respondent; and it seems to me that Donaldson strained to infer a major insult from this innocuous remark. When Jackson, probably in some pique, answered the question affirmatively, the claim of "crookedness" then became the key to her continued employment — Donaldson threatened discharge unless she apologized for "calling me crooked" (a word introduced by him) and for "just being an outright belligerent unruly employee." Jackson, known to Donaldson as a proud and independent employee, predictably got her back up and refused to apologize, and she was peremptorily dispatched.

I am convinced, given the background of Jackson's known activities and temperament, that Donaldson perceived this occasion as a fortuitous one for attempting to incite Jackson into behavior which would nicely serve as a basis for getting rid of her.[41] I reject the implication of Jackson's testimony that she was the wholly innocent victim of a Machiavellian plot concocted by Wimbley and Donaldson; I do believe that she engaged in some sort of excited exchange with Wimbley on June 6 which set her up as a target of opportunity, and that Donaldson decided to exploit the opportunity in an effort to cause Jackson to give him

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41 He had told her in November that if "any supervisor ever came to him with anything I had done, he was going to fire me."

grounds for executing his earlier threat "to fire" her. Of course, as Respondent argues, Donaldson knew that Jackson would immediately file a charge with the Board and that he would have to defend the personnel action in a situation which would be freighted with suspicion; in my judgment, he calculated that, with Rapp as a witness, the game would be worth the candle.[42]

Donaldson's testimonial reasons for the termination were not very convincing. Called as an adverse witness by the General Counsel, he specifically testified that he based her discharge solely on her "conduct in my office" and not on anything "anyone else said to me about Ms. Jackson." The discharge slip, however, reads, "Disrespect and insubordination toward personnel director and production supervisor." On the following day of testimony, having apparently given the matter more thought, in a *non sequitur* response to a question by Charging Party's counsel ("So, progressive discipline did not enter into Magnolia Jackson's discharge whatsoever?") Donaldson said, "Now, if I understand you correctly, Mr. Agee, you — you are asking me if I considered or had in mind anything that Miss Jackson had done prior to her dismissal date. Yes, sir, I considered other things. . . . I considered Miss Jackson for the last two years of being a constant source of harassment to this company." He then listed a number of examples, including the written reprimands Jackson had re-

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42 The traditional remedy of backpay to, and reinstatement of, a low-paid employee like Jackson is, unfortunately, not likely to be of such concern to a large employer like Respondent as to cause it to rule out such calculated risks as impractical.

ceived. Subsequently, in a remarkable demonstration of mental discipline, Donaldson stated that he had refrained from taking into consideration the November 1974 reprimand received by Jackson which had been rescinded as a result of a settlement agreement. It may be noted that the alternative position that the discharge was premised in part on Jackson's "two years of being a constant source of harassment to this company" could scarcely have been so refined as to exclude the four charges filed by Jackson and her circulation of the anti-Wimbley petition, all of which Donaldson must have regarded as "harassment."

I also find significant the strange offer that Jackson could avoid discharge if she would apologize to Wimbley and Donaldson. Donaldson testified to three such offers, Rapp recalled only one reference to apologizing; had there been three separate offers made and refused, I think Rapp would have remembered them. It rather appears that Donaldson made only one such offer which, in the heat of the moment and in a dependable manifestation of those very characteristics — pride and independence — which Respondent stresses in its brief, Jackson refused to accept. What seems peculiar is that Respondent would insist on an apology from Jackson as a predicate for remaining employed. A bottling plant is not a drawing room. Donaldson conceded that Respondent has a "policy" of using "suspension as a gradation of discipline." Jackson had not previously been suspended. Donaldson did not simply suspend her for a week or two for her perceived insubordination, which would seem normal industrial

discipline, but instead subjected her to the seemingly extraordinary requirement that she apologize or be terminated; I can think of no plausible reason for this other than that she could be relied on to refuse to apologize.

Donaldson's uncertainty about his reasons for discharging Jackson, after having months to consider the question, leads me to believe that he was not truly offended by her conduct in his office on June 6. His failure to call in Wimbley to stage a confrontation between the two to explore the known conflict in their stories is suspicious if, in fact, as the discharge slip states, Jackson's behavior toward Wimbley played a role in the discharge; Wimbley testified to at least one other occasion on which he had been called in by Donaldson when the latter was considering the termination of an employee. The conflict between Wimbley's testimony and his affidavit leads me to doubt that he had done more than convey the scantest information to Donaldson about his confrontation with Jackson, and yet Donaldson (although not consistently) relied on that episode as a predicate for the discharge. Donaldson's own version of the incident, in which he labored to twist a fairly ambiguous statement by Jackson into an accusation of his personal complicity in a "crooked" relationship with the Board, the withdrawal of which accusation, acquiesced in by Jackson, then becoming the prerequisite for Jackson's retention, indicates to me that Donaldson was taking advantage of the situation in the hope of manipulating

Jackson into reckless behavior which could plausibly serve as a basis for discharge.

It is my conclusion that Jackson's probable rudeness and loudness to Donaldson were, in part, deliberately provoked in an effort to provide grounds for consummation of Donaldson's threat to discharge Jackson, that his desire to do so was linked to her protected Section 7 activities, and that Jackson's misbehavior on the morning of June 6 "furnished the excuse rather than the reason for [Donaldson's] retaliatory action." *N.L.R.B.* v. *Thor Power Tool Company*, 351 F.2d 584, 587 (C.A. 7). Furthermore, accepting Donaldson's alternative contention that he was motivated in part by her "two years of being a constant source of harassment," and noting that Jackson's major activities which might be deemed "harassment" clearly consisted of her exercise of Section 7 rights during those two years, the conclusion necessarily would follow that her discharge was unlawful.

E. *The Nature of the Strike of July 7, 1975*

The complaint alleges that the strike which began on July 7, 1975, was an unfair labor practice strike.

Local 1196 president William Maxwell testified that on June 6, after learning that Magnolia Jackson had been discharged, he sent Mailgrams to officials of Teamsters International requesting authority to

strike. The requests cited Respondent's "refusal to bargain in good faith, unfair labor practices, and their refusal to honor our existing contract." Sanction was received on July 5. A union meeting was held on Sunday, July 6, at which the attending members were told that the purpose of the strike was to protest "unfair labor practices that Coca-Cola had done to the people out there and of the firing of Magnolia Jackson, one of our board members." A picket sign mentioning "unfair labor practices" and the "firing of Magnolia Jackson" was displayed at the meeting and thereafter during the strike.

Maxwell testified that the Union's officials had deliberately chosen not to strike in protest of the refusal to bargain due to the Board's Decision and Order of June 30, 1975, limiting Respondent's bargaining obligation to the November 1974 expiration of the bargaining agreement. The reason for so refraining, he testified, was that a strike thus motivated would appear to have a recognitional objective.

The complaint originally alleged that the strike was caused and prolonged by the unfair labor practices alleged therein and arising out of Cases Nos. 26-CA-4991, 26-CA-5620, and 26-CA-5729. Early on at the hearing, General Counsel stated on the record that Respondent's refusal to bargain was not alleged to be a cause of the strike. Subsequently, after the Board's order of November 28, 1975, remanding the refusal-to-bargain case (26-CA-5213) to me for hearing, and after

the receipt of testimony that Local 1196 continued, after the strike began, to distribute handbills which it had been using for consumer boycott purposes prior to the strike and which indicated a recognitional objective[43], General Counsel amended the complaint to allege that the refusal to bargain was an additional cause of the strike.

We thus have testimony by the president of Local 1196 that the strike had no recognitional objective and an amended complaint allegation that the strike was, in part, in protest of the fact that Respondent was refusing to bargain with the Union.

Traditionally, I believe, the uncontradicted testimony of Maxwell as to the reasons given to the membership for striking, prior to the strike vote, would be considered all but determinative of the reasons for the strike. Assuming, however, that the consumer handbills which the Union continued to distribute after the strike began, referring in part to Respondent's refusal to bargain, may be said to expand the causation of the strike, I would find that the strike was an unfair labor practice strike in all respects, since I will find, *infra*, that Respondent was under a continuing duty to bargain with the Union at all relevant times. In any event,

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43 The handbill stated, in part, that Respondent was "violating the National Labor Relations Act by refusing to bargain with the certified bargaining representative of its employees, Teamsters Local Union 1196."

it is settled that "if an unfair labor practice had anything to do with causing the strike, it was an unfair labor practice strike," *General Drivers and Helpers Union, Local 662* v. *N.L.R.B.*, 302 F.2d 908, 911 (C.A. D.C.). The unimpeached testimony as to what the membership was told at the strike meeting establishes the requisite partial motive.

Respondent argues that if the strike had a recognitional objective, it was violative of Section 8(b)(7)(C) of the Act, since the picketing continued for more than 30 days without the filing of a representation petition, and that it was, accordingly, "a strike in violation of the Act." Presumably, Respondent, which cites no cases, is contending that the strike thereby constituted unprotected conduct. But since Section 8(b)(7)(C) exempts picketing by labor organizations which are "currently certified" as the representative of the employees involved, and since I will find that the certification of the Brewery Workers Local devolved upon the Teamsters Local and continued in effect before and after July 7, 1975, the argument, even assuming it is relevant to a determination of the character of the strike,[44] is unacceptable. Furthermore, if it be said, as Respondent argues, that the Board's Decision and Order of June 30, 1975, "effectively destroyed the benefits of certifica-

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44 In *Local Union No. 707, Highway and Local Motor Freight Drivers, Dockmen and Helpers (Claremont Polychemical Corporation)*, 196 NLRB 613, the Board held that *picketing* in violation of Section 8(b)(7)(B) was unprotected conduct, while also holding that participation in the strike, as such, would not be unprotected.

tion by holding that there was a valid question concerning representation created by the pendency of the RD petition," it is a fact that as of July 7, 1975, and until October 6, 1975, the decertification petition in Case 26-RD-280 was pending, having been reinstated by the Board's June 30, 1975, Decision. The pendency of this petition appears to satisfy the requirement of Section 8(b)(7)(C) that "a petition under Section 9(c) [be] filed"; in view of the existence of that petition, and the Board's mandate that it be processed, it would have been pointless for the Union to file another petition for election. With the approval of the withdrawal of the petition in Case 26-RD-280 on October 6, the "current certification" of the Union once again became an undoubted reality and the strictures of Section 8(b)(7)(C) would no longer apply.

Accordingly, I find that the strike which commenced on July 7, 1975, was provoked by Respondent's unfair labor practices and continued thereafter to be an unfair labor practice strike.

F. *Alleged Violations During the Strike*

Several incidents occurring after the strike commenced on July 7, 1975, are alleged to be violative of the Act, some relating to the treatment of strikers.

1. The Watson and Parker incidents

Striker James Watson testified that he was told by Donaldson, when he attempted to pick up his pay-

check on July 14, to see him in his office. There, Donaldson asked if Watson had quit his job; he said he had not. Donaldson then told him, "You have been off five days and . . . a man [who] misses more than three days, I consider them fired." He gave Watson his check and Watson left.

Isaac Parker, a striking employee, was told on July 14, when he went to pick up his check that he would have to see Donaldson. Donaldson asked him his name, his department, and if he "was still working" for Respondent. Parker replied that he did "before the strike," and Donaldson said, "What strike, there is no strike here, we are still working, don't you see the truck— don't you see the machines from the window all running." Then, said Parker, Donaldson "asked I mean [sic] to tell him that I was walking off my job and knew nothing about these people." He told Parker, "I thought you were the man who had a lot of knowledge," after which he instructed him to go to the payroll office to get his check. Employee Cluster Hoyle had come with Parker to pick up his own pay, but was not asked to see Donaldson. Parker did not recall Donaldson asking for any identification.

Donaldson testified that the procedure for strikers to pick up their paychecks was to have any striking employee whom the personnel clerks could not identify sent to Donaldson. He said that, upon such oc-

casions, he would ask the employees if they had quit their jobs. If the response was negative, and nothing else was volunteered, Donaldson would ask why they were not at work; if the employee replied by saying that he was on strike, that would be the end of the conversation.

Watson appeared to be inebriated at the hearing; although he exhibited alertness on cross-examination, I do not trust his testimony. Parker did not particularly impress me; although he conceded on cross-examination that Donaldson had asked his name and department, testimony which he did not give in his direct examination, this suggestion that Donaldson did not recognize him is inconsistent with his claim that Donaldson expressed familiarity with Parker: "I thought you were the man who had a lot of knowledge." I am inclined to recommend dismissal of the allegations regarding Watson and Parker, since I am unwilling to rely upon the testimony of those employees, and I see no violation in the admitted questioning of employees as to whether they had quit. I cannot say that I see any legitimate purpose for such questioning, since it appears that other strikers were given their paychecks even though they did not declare their status; on the other hand, the interrogation does not seem to me to have coercive overtones which would tend to inhibit the strikers in the exercise of their protected rights.

2. The alleged violations with respect to Rainey, Baiel, and Lambe

The complaint alleges that Respondent violated the Act by its treatment of strikers Leo Rainey, Stephen Baiel, and Robert Lambe. The allegations, particularly as to Lambe, are in the alternative. Some of the relevant events as to the three conjoin, and it seems desirable to discuss the pertinent allegations together.

a. The meeting on the morning of July 15 with Lambe

Robert Lambe, a cooler serviceman, went on strike on July 7. His job involved the repair of vending machines, for which he earned $191 for a 45-hour week. The complaint has a complex allegation as to Lambe. It alleges, alternatively, that Respondent discharged Lambe on July 15, in violation of Section 8(a)(3); that, if Respondent did not discharge Lambe, it unlawfully refused to reinstate him to his former employment upon his unconditional request of July 15; and that, if Lambe "unequivocally severed" his employment on July 15, and lost his right to reinstatement, Respondent unlawfully refused to rehire Lambe later on July 15 when he made application for work as a "new employee."

Lambe testified that, having picketed since the strike began, he went, on July 15, to the personnel office to

pick up his paycheck, and was there told to go to Donaldson's office. He found Donaldson, president Pidgeon, and vice president Gassaway. Cold drink department manager Sledge came in at a later time.

According to Lambe, Donaldson asked him why he went on strike. When Lambe said that he and three other cooler servicemen, Robert Poole, Stephen Baiel, and Leo Rainey, would return later that day to discuss their possible reinstatement, Donaldson said he would like to discuss the matter right then. Lambe spoke of various grievances, including the cost of uniforms and the insurance program. He went on to say there was "no future" there. Pidgeon "jumped up" and challenged the statement, saying, "This company has been here since 1902," and he told Donaldson to give Lambe his uniform refund and "let him sign that dismissal slip and get him out of here." Donaldson handed Lambe a slip which he signed without reading, and Pidgeon told him, "I don't ever want to see your face in here again." Pidgeon "handed me my paycheck and I left."

Fifteen-twenty minutes later, Lambe called Donaldson (from the union hall) to ask what it was he had signed. When Donaldson told him it was a "voluntary quit notice," Lambe noted that Pidgeon had referred to it as a "dismissal slip," but Donaldson said he must be mistaken.

Lambe then turned his uniform in to Robert Harpst, parts manager in the cooling department, and went to the personnel office to pick up his uniform refund. He walked into Donaldson's office and found strikers Rainey, Poole, and Baiel in conversation with management representatives.

b. The afternoon meeting on July 15

Leo Rainey went on strike on July 7 and served as a "temporary strike captain." On the afternoon of July 15, with Robert Poole and Stephen Baiel, Rainey went to Donaldson's office. Lambe, as indicated, came in later. Present, eventually, for management were Donaldson, Pidgeon, Gassaway, Pierotti, and Rainey's supervisor Cocke.[45]

Baiel said the employees were there to seek reinstatement.[46] Pidgeon said that "if we had any grievances, we should have come to him and talked with him about it." Rainey replied that he had spoken to Cocke about one of his grievances. At some point, there was discussion of an asserted grievance about promotions. Someone (obviously in management) said "[s]omething about that maybe I was being taken advantage

45 The meeting had been arranged with Pidgeon by Baiel.

46 The following account of the meeting is based on Rainey's testimony. Although alleged to be a discriminatee, Rainey (and also Baiel) had to be required to testify by court enforcement of a subpoena. Rainey was not pleased to testify against Respondent; he did so, I felt sure, with fidelity to his oath.

of," to which Rainey replied that it was "my choice." Asked at the hearing if he recalled that Pidgeon had said that the strikers "were a bunch of savages," Rainey testified, "I believe there may have been that said." He more clearly recalled that Pidgeon said "we must have agreed with the savage content [of the strike] or we wouldn't have associated with them." Rainey was aware at the time of some strike violence which had occurred. Pidgeon seemed "very upset" and "excited." Rainey "believe[d]" that Pidgeon or another company official asked if the employees could live on the $25 a week being paid by the Union. Pierotti asked Baiel if he had not recently become a father. Pidgeon said he had heard that Rainey had said he would strike for 3 years and put his wife to work, and asked why he was seeking reinstatement if he was ready to send his wife to work. Pidgeon told Rainey that the Union was "using [him] as a white man to walk a black picket line." Pidgeon said that Rainey had "those damn' bumper stickers all over [his] motorcycle," which Rainey denied.[47] Toward the end of the meeting, after Lambe had appeared, Lambe asked if he would be considered for reinstatement along with the others, and was told that he would be. Someone, probably Donaldson, said "each [employee] would be considered on [his] own," and that he would "get in touch" with them. On cross, Rainey agreed that the employees were told that they would be considered without regard to the fact that they had struck.

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47 Rainey testified that he had pasted on his motorcycle one sticker reading "Don't buy Coca-Cola."

Lambe testified that after he arrived at the afternoon meeting, Gassaway asked the employees, one by one, if they believed they had made a mistake in joining the strike.

c. The alleged Section 8(a)(1) violations on July 15 and thereafter

The complaint alleges that Pidgeon violated the Act by telling the employees that the pickets were a "bunch of savages" and that the employees must have sympathized with acts of strike violence by choosing to stay out on strike. Pidgeon conceded that, when the strikers came to discuss reinstatement on July 15, he was "pretty upset at the time" about some alleged incidents of violence. In the course of this discussion, he mentioned some of the incidents and described them as "savage attacks on employees of the Coca-Cola Company."

I prefer the more credible testimony of Rainey, and find that Pidgeon told the employees that they "must have agreed with the savage content [of the strike] or we wouldn't have associated with them." This gratuitous remark, not justifiable as an investigation of the conduct of the employees seeking reinstatement because not so limited made by the president of the Respondent who was "pretty upset at the time," had, I believe, a natural tendency to discourage the strikers, who had come hats in hand to get their jobs back, from

any further association with the strikers. Such a comment reasonably tended to inhibit the future union activities of the employees (particularly since they were told at the end of the meeting only that their requests for reinstatement would be considered). Similar vilification-by-association of employees has been held violative of Section 8(a)(1), *Hendriksen, Inc. d/b/a Gibson Discount Center*, 191 NLRB 622, 629, enfd. in pert. part, 481 F.2d 1156, 1167-1168 (C.A. 5).

The complaint further alleges that Pidgeon violated the Act by telling Rainey that the Union was "using [him] as a white man to walk a black picket line." Although Pidgeon denied making the statement, I believe Rainey. By such a remark, Pidgeon was plainly attempting to vilify Rainey by suggesting that, from Pidgeon's perspective, Rainey was demeaning himself by his association with the other strikers, and thus lessening his stature in Pidgeon's eyes.[48] Such an inherently divisive and inflammatory comment could only have tended to deter Rainey's future support of the Union, and I conclude that it violated Section 8(a)(1). Again, this comment amounted to abusive and unlawful vilification, *Hendriksen, Inc., supra.*

The complaint additionally alleges that Pidgeon violated the Act by "[s]oliciting employee grievances and implying that Respondent will rectify said grievances in

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48 I credit Jackson's detailed testimony as to the racial composition of the picket line.

order to induce employees not to support the Union." Rainey, whom I believed, testified that Pidgeon said to the employees, shortly after they arrived, that "if we had any grievances, we should have come to him and talked with him about it." Pidgeon in part substantiated Rainey's testimony by saying that one of the employees raised a question about summer vacations, and that he replied that "anytime you had a problem with your supervisor and if you couldn't get it over to him that they could either come see Mr. Donaldson or myself, Mr. Gassaway or any of us."

The Board has indicated some division about the appropriate standard to apply in determining when the express or implied solicitation of grievances constitutes an unlawful promise of benefits. See *Uarco, Inc.*, 216 NLRB No. 2; *Flint Provision Co.*, 219 NLRB No. 98. In the latter case, where an employer told an employee "that he had the Company for 25 years and felt bad that no one had approached him because he could have ironed out any problem," the Board found no violation. In *Flint*, however, the Board noted that the remark was not made in circumstances "calculated to intimidate and coerce the employees." Here such a coercive context existed. In the circumstances of the conversation, and in the absence of any showing that the 500 employees in this plant had previously been encouraged to walk into the office of the president to discuss their grievances with him, I conclude that Pidgeon's holding out of such an opportunity was a newly-

promulgated grant of benefit designed to encourage employees to abandon the Union. *Reliance Electric Company*, 191 NLRB 44, 46.[49]

The complaint alleges that vice president Gassaway "coerced employees who had made unconditional offers to return to work by asking the employees, individually, if they felt they 'had made a mistake' by taking part in the strike." Gassaway testified that in the July 15 meeting, Poole, in denying involvement in strike violence, said that he had "made a mistake" and that he would be willing to withdraw from the Union if it would secure his reemployment. After Pidgeon stated that union status had no relevance to reinstatement, Gassaway, as he testified, then asked the other three men, one by one, if their sentiments were the same as Poole's, "that you want your job back, that you made a mistake." They each replied affirmatively. Gassaway testified that he asked the question in the context of his understanding of Poole's statement that "I want my job back and I'll withdraw from the union if it will help to get my job back," and that he prefaced his questions with another, addressed to Poole — "Are you speaking only for yourself, or are you speaking for these other gentlemen" — to which Poole replied that he was speaking only for himself, "but I think they feel the same way."

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49 The fact that the employees were in the office to seek reinstatement does not, of course, imply that they had withdrawn their allegiance to the Union.

It is patently offensive to Section 7 rights for a management representative to attempt to extract from strikers who are seeking reinstatement an admission that they, like one of their fellows, believe that they had "made a mistake," especially when the question posed and the admission sought might be reasonably understood to encompass the fellow employee's offer to withdraw from the Union and, as well, to potentially affect their reinstatement. I find Gassaway's queries to the employees to be violative of Section 8(a)(1). *Omark-CCI, Inc.*, 208 NLRB 469, 474 (question to an employee seeking reemployment requiring him to indicate "whether he had repented or still supported the Union" held violative).

The complaint alleges that cold drink department manager Sledge, in mid-July, coerced employee Lambe by telling him that Lambe "had let him down by engaging in union activity."

Lambe testified that Sledge made such a statement in a telephone conversation several days after the July 15 meeting. Sledge denied making the statement. Although I considered Sledge to be an unreliable witness, I shall discredit a major portion of Lambe's testimony thereafter. I see no reason to credit him on this segment. Accordingly, I shall recommend that this allegation be dismissed.

d. The alleged violations regarding the reinstatement of Rainey, Baiel, and Lambe

Poole, Rainey, and Baiel, but not Lambe, were returned to Respondent's employ by October 1975. The complaint alleges no violation as to Poole; it does, however, charge unlawful treatment of strikers Rainey, Baiel, and Lambe.

Leo Rainey: As set out above, Donaldson told the strikers at the end of the July 15 meeting that he would "get in touch" with them about their request for reinstatement. The testimony of Respondent's representatives about the decision-making process which they thereafter entered upon is confusing and contradictory. Prior to July 15, Respondent had evidently secured a court order enjoining the strikers to engage in peaceful picketing. Thereafter, but apparently not until July 24, Respondent filed a petition accusing certain strikers of being in contempt of the petition.

According to Gassaway, shortly after the four employees left the July 15 meeting, the management representatives held a brief discussion about reinstating the employees. Donaldson pointed out that Baiel was named in a contempt petition as having been involved in misconduct, and it was decided to "look into that matter further."[50] They agreed that there was no obstacle to Poole's or Rainey's reinstatement, even though, as Donaldson and Pidgeon testified, Rainey

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50 As indicated *supra*, the petition apparently was not filed until later. The testimony of Donaldson and Pidgeon indicates that the conversation involved possible acts by Baiel and Rainey in contempt of the injunction, rather than a discussion of an already-filed contempt petition.

was believed to have engaged in some slight misconduct, and Pidgeon told Donaldson to contact them. According to Gassaway, it was brought out that Lambe had resigned that morning, "[s]o that eliminated him as far as we were concerned at that point." However, Gassaway testified on cross that that disposition as to Lambe was merely the "inclination" at the meeting, which wasn't "finalized" until later discussions between Donaldson and Pidgeon, into which Gassaway had some "input."

It was further brought out on cross that Rainey had also been named in the contempt petition, filed on July 24, for having allegedly waved picket signs at customers to prohibit their entrance and voicing loud and profane remarks to them.[51] Confronted with this, Gassaway then recalled that at the July 15 meeting of management officials, it was decided definitely only that Poole would be offered reinstatement, and that Rainey's status would be further considered. He also stated that either the next day or the one thereafter, Donaldson told him that he and Pidgeon had decided that Rainey's conduct was insignificant, and Donaldson had been instructed to contact Rainey.

Donaldson, to the contrary, testified that an immediate decision to recall Rainey and Poole was made by Pidgeon on July 15, and that he attempted to call Rainey "the next day."[52] He was also concurrently

51 Baiel was charged in the same petition with calling Pidgeon an obscene name and uttering other obscenities.

52 His affidavit says "the morning of July 16"; his testimony was that it was "the evening of the 16th."

attempting to contact Poole. He was successful in reaching Poole, and the latter returned to work the following Monday. Donaldson testified that between July 16, the day he began calling Rainey, and July 18, he made "two" calls to Rainey's home. On July 18, Rainey called in to Respondent's personnel office and quit, notifying the payroll office that he had another job. Having waited to hear from Donaldson in vain, Rainey had sought out another job and had been hired. Rainey testified that his new employer, Camp Electric, had told him that he would have to quit Respondent before he could be hired, and he did so. He later turned in his uniforms and withdrew his pension fund benefits and his uniform deposit. Sometime in October, Sledge suggested to Rainey that he should call Donaldson. Rainey did, and Donaldson offered him work. He returned to Respondent's employ on or about October 20, 1975.

Donaldson testified that once he received notice that Rainey had quit,[53] he did not further attempt to offer Rainey a job. His reason for not doing so is unclear. He testified that he ceased attempting to contact Rainey because:

> Mr. Rainey was aware of who had been reinstated on his job prior to the time he quit. I felt like that this was sufficient and, after I had attempted to hire him and continued to try to

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53 Rainey did not personally notify Donaldson on July 18 that he was quitting.

> contact him he still came into the office, he quit on his own accord, and it was just my belief that the man no longer wished to work for the Company.

The reference to Rainey's awareness of "who had been reinstated on his job prior to the time that he quit [which] . . . was sufficient" is meaningless to me. Donaldson testified otherwise that Rainey's job was "open" prior to July 18.

As an unfair labor practice striker, Rainey was entitled to a prompt offer of reinstatement to his job upon unconditional application. *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 278. Once a striker has made such application, the employer, in order to establish compliance with the foregoing principle, "must present probative evidence showing a good-faith effort to communicate such an offer [of reinstatement] to the employee . . . [and] must show that he has taken all measures reasonably available to him to make known to the striker that he is being invited to return to work." *J. H. Rutter-Rex Manufacturing Company, Inc.*, 158 NLRB 1414, 1524. The Trial Examiner in that case went on to say that he did not regard "the telephoning of the residence of a striker and leaving a message for him, which is not shown to have been communicated to the striker", to be adequate satisfaction of the employer's duty to communicate an offer of reinstatement. *Ibid.*

The fact that the Board has normally established a backpay period which begins 5 days after receipt of a striker's request for reinstatement does not, in my judgment, diminish the employer's obligation to promptly respond to the striker's request. Indeed, although the 5-day period has been the traditional trigger date for backpay in the past, the Board has recently, in *Television Wisconsin, Inc.*, 224 NLRB No. 96, n. 3, ordered that backpay for unfair labor practice strikers commence from the date of their unconditional request, rather than from 5 days thereafter, as the Administrative Law judge had recommended. In the present circumstances, there is no showing of a need for Respondent or for Rainey to delay his reinstatement, and no reason to believe that he could not have been reinstated on the day following his request.

The evidence leads me to believe that, prior to July 18, Respondent did not fulfill its obligation to make a "good-faith effort" to communicate an offer of reinstatement to Rainey. Rainey testified that he and his wife were at home a good deal of the time prior to July 18, and it seems improbable that, had Donaldson attempted to call, he would have been unable to establish contact. But assuming that Donaldson made the two telephone calls to which he testified, I think it evident that two calls in 3 days do not constitute the "good-faith effort" contemplated by law.[54]

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54 There is simply no reason why Donaldson could not have assigned a clerk to periodically attempt to call Rainey, or could not have sent him a letter.

It is manifest that Respondent's representatives were angry at the strikers. The details of the July 15 conversation described above convincingly display that anger; and that it was particularly channeled toward Rainey is indicated by Pidgeon's outburst against the "damn" stickers on Rainey's motorcycle and Pidgeon's accusation that Rainey had degraded himself, and inferentially all whites, by being used as a "white man to walk a black picket line." The nature of the conversation amply explains Respondent's sluggishness in attempting to make an offer to Rainey. In contrast, it is of interest to note that prompt contact was somehow made with Poole, who had announced on July 15 that he had "made a mistake" and was willing to forego the Union if doing so would secure reinstatement for him.

Nor, in these circumstances, do I believe that Respondent can rely on Rainey's notice of quitting given on July 18. Having dallied in offering reinstatement to Rainey, who was known to be waiting for an offer, Respondent might well have expected that Rainey, hearing nothing, would conclude that he was being rejected, and that he would search out another job. But when Rainey called on July 18 and announced that he had taken other employment, Donaldson, who must have promptly learned of this action, made no effort thereafter to let Rainey know that Respondent had decided to allow him to return, until an offer was made sometime in October (the complaint, listing Rainey as a discriminatee, issued on October 8). Surely, Donaldson realized that Rainey, with more than 6

years tenure at the time, wanted his old job back, as he had declared on July 15.

I do not believe that because Rainey quit on July 18, he was no longer entitled to consideration. Board law, dealing primarily with the question whether strikers abandoned their jobs and were therefore ineligible to vote in elections, holds that the party opposing eligibility must show that the striker evidenced an intention to abandon his interest in the job and permanently sever the employment relationship. *Pacific Tile and Porcelain Company*, 137 NLRB 1358, 1359. The fact that a striker submitted a notice that he was quitting is not necessarily conclusive of permanent abandonment. *The Fafnir Bearing Company*, 73 NLRB 1008, 1015; *Guyan Machinery Company*, 155 NLRB 591, 593-594; *S&M Manufacturing Company*, 165 NLRB 633; *Roylyn, Inc.*, 178 NLRB 197; *Dalton Sheet Metal Company, Inc.*, 207 NLRB 188, 191-192. In some cases, the Board has found the quit notices to be effective, *Beverage-Air Company*, 185 NLRB 168, 170, *P.B.R. Company*, 216 NLRB No. 112, sl. op. p. 6, and in one case, involving the right of unfair labor practice strikers to reinstatement, the Trial Examiner, approved by the Board, found that the resignation of the unfair labor practice strikers did not evince an intention to abandon their rights, but took note of the employer's right "to rely on the resignation," and, "[a]s a balance of the equities," held that the strikers were not deprived of their reinstatement rights but that their backpay should be tolled as of the dates of their resignations, *Mississippi Steel Corporation*, 169 NLRB 647, 663.

To determine the eligibility to vote in an election of strikers who have "quit," on the basis of a circumstantial appraisal of their intent to permanently sever employment, is one thing; to determine their status as strikers for purposes of reinstatement and backpay seems to be another. In the ordinary case, I would be loath to hold an employer to a backpay liability for a striker who requests reinstatement and then quits; the "balance of equities" referred to in *Mississippi Steel Corporation, supra,* would weigh against holding an employer responsible who takes the quit notice at face value. But in *Beverage-Air Company, supra,* finding that the strikers, who had never sought reinstatement, had freely quit, the Board specifically noted that "there is not the slightest hint in the record of any subterfuge on the part of the Respondent." 185 NLRB at 170. Here, there is such evidence. Apart from the obvious connotations of the July 15 conversation, I note Donaldson's confused explanation of why he did not continue to offer a job to Rainey after July 18. Concluding that there is no doubt that Rainey did not intend to permanently sever his employment[55] and that, had Donaldson acted in good faith in following up on Rainey's request for reinstatement, it is altogether likely that Rainey would have promptly been reinstated before he was compelled to quit, I believe that Respondent is estopped from relying on the quit notice submitted on July 18

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55 As indicated, he "quit" only at the behest of his new employer. The new job was clearly not substantially equivalent employment: it paid $31 less per week and did not provide the fringe benefits afforded by Respondent.

Accordingly, I find that Respondent violated Section 8(a)(3) and (1) by refusing to reinstate Rainey to his former position pursuant to Rainey's request of July 15.

Stephen Baiel: The justification offered for the refusal to honor Baiel's request for reinstatement was that he was thought to have engaged in misconduct on the picket line. According to Pidgeon, the management representatives decided on July 15 to look into the nature of the charges they believed were pending against Baiel, and he and Donaldson later decided to reinstate Baiel because his alleged misconduct — saying "a few words to me personally" — was not serious enough to preclude reinstatement. The record is unclear as to when Baiel returned to work: he testified that he thought it was in September; Donaldson testified that he made the offer in October.

In order to serve as a defense to reinstatement, the misconduct of strikers must be "so violent or of such serious character as to render the employees unfit for further service." *N.L.R.B.* v. *Illinois Tool Works*, 153 F.2d 811, 815-816 (C.A. 7). It has been held, even in an unfair labor practice strike setting, that "the burden of proving innocence of strike misconduct shifted to the General Counsel upon proof of a good faith belief by the employer that such misconduct had occurred." *Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745*, 389 F.2d 553, 554 (C.A. D.C.) enfg. 161 NLRB 887, 911; *Capital Rubber & Specialty Co., Inc.*, 201 NLRB 715, 721.

Assuming that the foregoing standard is applicable, I find that Baiel was unlawfully denied reinstatement. I do not believe that Respondent entertained a "good faith belief" that Baiel engaged in misconduct warranting denial of reinstatement; the fact that it apparently chose to "investigate," for 2 or 3 months, evidence as to Baiel already known to it on July 15, in the light of its plain enmity to the strikers, refutes any claim of good faith.[56] In any event, the alleged name-calling by Baiel, even if assumed to have occurred, clearly did not render him unfit for future service, *Longview Furniture Company*, 100 NLRB 301, 304, *Firestone Tire & Rubber Company*, 187 NLRB 54, 55-56, particularly in light of the balancing test prescribed for testing employee misconduct in the context of an unfair labor practice strike, *N.L.R.B.* v. *Kohler Company*, 300 F.2d 699, 702-705 (C.A. D.C.).

Accordingly, I conclude that the failure to promptly reinstate Baiel upon his unconditional request of July 15 constituted a violation of Section 8(a)(3) and (1).[57]

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56 Donaldson testified that Baiel was still named in the contempt petition at the time he was returned to work.

57 Even if the strike had been an economic strike, the record would unequivocally support a finding that Rainey and Baiel, as economic strikers unconditionally requesting reinstatement, were unlawfully denied such reinstatement. It is clear that many jobs were open after July 15 to which the two could have been reinstated. *Fire Alert Company*, 207 NLRB 885, 886. Donaldson testified, in fact, that the jobs of Rainey and Baiel remained vacant until they returned. While he said that business was down and they were not really needed, he also testified that "we were trying to offer people jobs that we didn't have a need for," indicating that, had Respondent treated these applications in the spirit required by the statute, the two would have been reinstated.

Robert Lambe: As previously described, Lambe testified that when he walked into Donaldson's office on the morning of July 15, it was simply with the intention of picking up his paycheck, and that, after being drawn into a conversation with Pidgeon and Donaldson in which he criticized company policies, he was unceremoniously discharged. Pidgeon and Donaldson testified to the contrary, that Lambe came in to state that he was quitting, that there was a brief discussion about Lambe's grievances, and that Lambe thereafter signed the voluntary quit slip now in evidence.

Although I did not find Pidgeon and Donaldson to be convincing witnesses, there are elements of Lambe's testimony which I consider incredible. Robert Harpst, the parts manager, who seemed believable, testified that when Lambe turned in his uniforms, Harpst asked Lambe what he was going to do, and Lambe replied that he "was going to quit." When Lambe was called to testify in rebuttal, he at first denied having mentioned quitting, stating that he had simply asked Harpst what to do with his uniforms and then left. On cross-examination, however, when asked if he denied having told Harpst that he was quitting, Lambe testified, "I don't remember." This last answer, which admits of the possibility that Lambe might have referred to quitting, is totally inconsistent with his contention that he had been summarily dismissed. It is very likely that Harpst, who had seen Lambe every day for the preceding 18 months, would have asked Lambe why he was turning

in his uniforms (a fact Lambe at first impliedly denied and then could not remember), and I credit Harpst that he both asked the question and received the stated answer. I infer, therefore, that Lambe did indeed resign on the morning of July 15.[58]

There is more controversy about what happened next. Lambe testified that 15 minutes after leaving Donaldson, he called, from the union hall, to find out the nature of the slip he had signed, and, upon being told that it was a resignation, said to Donaldson that there must be some mistake, since Pidgeon had referred to it earlier as a "dismissal slip." Donaldson testified that Lambe, shortly after resigning, returned and asked that the slip be changed to reflect a discharge rather than a resignation. I suspect, and Lambe's rather odd call supports a belief, that Donaldson was telling the truth — it seems probable that Lambe, a young man, and perhaps impetuous, had discovered at the union hall that, having quit, he could not receive unemployment compensation, and thereupon changed his mind about quitting.

Thereafter, however, it is clear that when Lambe appeared in the afternoon meeting with Poole, Rainey, and Baiel, Respondent understood that he was seeking rehire. Thus, as Donaldson testified, the subject of the

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58 I also find it improbable that Pidgeon would have told Donaldson to "let him sign that dismissal slip," which sounds artificial, contrived, and unlikely.

reemployment of Lambe was discussed at the brief management meeting after the employees departed on the afternoon of July 15, but "the decision was not made at that time."

The testimony given by Respondent's witnesses as to the basis for the decision subsequently made not to reemploy Lambe is riddled with inconsistency. Cold drink department manager Sledge testified that on July 17, Lambe called Sledge, a friend of Lambe's father, and asked to be rehired. Sledge said he would have to take the matter up with Pidgeon, who, as Sledge and Pidgeon testified, as a matter of existing policy, personally passed on all applications for rehire by skilled employees who had resigned.[59] Shortly thereafter, according to Sledge's testimony, Pidgeon told Sledge that he did not want to rehire Lambe because "he had resigned, he had made several remarks critical of the company, that he seemed to be genuinely dissatisfied with company policy." In his pretrial affidavit, however, Sledge stated that Pidgeon had only said to him that "Lambe had resigned and that was it." Sledge, a law school graduate, was not convincing in his attempt to explain away the affidavit by testifying that his attorney had advised him to give a "very brief summary" of the events,[60] nor was my confidence boosted

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59 Lambe, a cooler serviceman, was considered a skilled employee.

60 The Lambe episode was the only matter to which the affidavit was addressed.

by his statement that, at trial, he was "embellishing, giving you a statement the best that I can remember of everything that happened at the time."[61]

Sledge's testimony was obviously an attempt to conform to Pidgeon's anticipated testimony. Pidgeon testified that he told Sledge that "Lambe had quit and under the circumstances that he had quit we wouldn't take him back." Pidgeon further testified that either on July 15 or possibly "two or three days later," but prior to his conversation with Sledge, he had consulted with Gassaway and Donaldson about Lambe, and they had decided not to rehire him because "[i]t was evident to me and the other two, Gassaway and Donaldson, that he was completely unhappy with his job and the company." Although, as shown, Pidgeon allegedly mentioned to Sledge the fact that Lambe had "quit" as a factor in the decision, he testified that it was the "circumstances," not the fact of quitting, which were controlling.[62]

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61 Nonetheless, because of my difficulty in crediting Lambe, I cannot rely on Lambe's testimony that Sledge told him, on one occasion, "Robert, you let me down when we needed you most," and on another, that Pidgeon had said Respondent did not "need him and they hired two men in the cooling department, and I shouldn't have signed that voluntary quit notice."

62 The testimony, given by Pidgeon and Sledge, that company policy dictated that Pidgeon personally pass on all requests for rehire by skilled employees who had quit, is not contradicted but nonetheless peculiar. The purpose, according to Pidgeon, is to give skilled employees, who are "harder to find," "every benefit of the doubt"; yet unskilled former employees, who are easier to find, are rehired directly by the personnel office without Pidgeon's intervention.

Donaldson's testimony differed from that given by Pidgeon. He said that Lambe was inconclusively discussed on July 15; that Donaldson participated in further discussions about Lambe and "we also discussed it with the attorney"; and that Pidgeon himself made the final decision, which he "communicated" to Donaldson probably on July 16. Donaldson, called by the General Counsel, gave testimony as to the reason for the Lambe decision which was most confusing. At first he seemed to testify that Lambe was not rehired "because of his activities and actions toward myself and the president" when he quit; then he expanded the basis for the decision to include his meeting with Lambe at which the latter asked Donaldson to be dishonest in changing the termination slip; then he added that one of the reasons Respondent would not return Lambe to work was because "Robert Lambe quit his job with the company," a factor which, as discussed, Pidgeon later discounted.

Most significant, however, is Donaldson's pretrial affidavit, given on August 21. In explaining why Lambe had not been rehired, Donaldson referred *only* to Lambe's effort to have him change the nature of the termination slip:

> With respect to Robert Lambe, it was decided that we would not consider Lambe for re-employment. We reached this decision because Lambe had come back and asked me to

> change the separation notice to state that he had been fired (which would have been an untrue statement). Therefore, no effort has been made to contact Steve Baiel and Robert Lambe concerning recall.

The affidavit thus makes no mention of Pidgeon's explanation that Lambe had been refused rehire because he had shown he was "completely unhappy with his job and the company." That Lambe had not in fact demonstrated such unhappiness is also indicated by Donaldson's affidavit describing the July 15 conversation, in which Donaldson stated that, in response to a question by Pidgeon, Lambe had denied that the company had been "giving him a hassle," and had said that he "really didn't have any problems with the company"; the only disparaging remark of Lambe's noted by Donaldson's affidavit was that "while he didn't have any problem with the company, it just seemed to take too long to move up in the company, that there didn't seem to be a future there," giving an example of the career of Harpst. The dispassionate tone and limited content of Donaldson's affidavit on this point hardly supports the claim by Pidgeon that Respondent was convinced that Lambe was "completely unhappy with his job and the company."[63]

This morass of contradiction and inconsistency by management witnesses strongly suggests that the

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63 At the hearing, Donaldson testified that the July 15 conversation was not "heated," that Lambe was not "all that excited," and that Lambe "did at one time express his dislike for his job."

reason for refusing to reemploy Lambe was none of the several grounds averted to, but, rather, an illicit one. As indicated in the group interview of July 15, Pidgeon was angry at the strikers, and particularly the white strikers.[64] I infer from the foregoing evidence of hostility to the strikers, as manifested especially by the treatment of Baiel and Rainey, that Respondent refused to reemploy Lambe not because he had quit, and not because of his conduct on the morning of July 15, and not because of his request to change the wording of his termination slip, and not because of a combination of the three, but because he had gone on strike. In so finding, I conclude that Respondent violated Section 8(a)(3) by refusing to reemploy Robert Lambe.

G. *The Alleged Violation of Section 8(a)(5)*

As indicated above, by an unpublished order of November 28, 1975, the Board ordered that its Decision and Order in *The Coca-Cola Bottling Company of Memphis,* 218 NLRB No. 129, be "vacated"[65] and that that case (Case 26-CA-5213) be consolidated for hearing with the cases alleging violations of Section 8(a)(1) and (3) which were currently being tried before me. The order of the Board was based on a motion by the Charging Party, filed October 14, 1975, referring the

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64 Pidgeon was attuned, as he testified, to the identity of the white strikers: "Baiel, Rainey, Lambe, and there were a couple more . . . Cartwright."

65 The Board's order vacated its "Decision and Order of September 22, 1975." I assume that the intended reference was June 30, 1975.

Board to the proceeding then about to go to trial before me and asserting that the allegations before me, if proven, would, in the Board's paraphrase, "establish that Respondent unlawfully solicited employees to decertify, and not to support the Charging Party." The Charging Party had also pointed out, as the Board said, "that the decertification petition in 26-RD-280, upon which the Board heavily relied in its Decision and Order, had been withdrawn." In granting the motion, the Board stated: "The Board unanimously agrees that the impact of Cases 26-CA-4991, 5620, and 5729 on Case 26-CA-5213 must be considered."[66] Exactly what the Board intended the remand to encompass, as far as the taking of evidence goes, was the subject of much argument at the hearing. A recital of the most relevant history in Case 26-CA-5213 seems appropriate at this point.

After the merger of the international unions, the newly-chartered Local 1196, in March 1974, conducted an election among certain of the unit employees to vote on affiliation with Teamsters International. Only 81 unit employees (of some 500) voted in the election; of these, 78 favored affiliation. Thereafter, Local 1196 filed a petition to amend the certification (Case 26-AC-24) to substitute the Teamsters designation for that of the Brewery Workers. Respondent participated in that proceeding and argued that the successorship election

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66 In dissent, Chairman Murphy would have considered any such impact at a future time, without granting the motion at present.

was improper for various reasons. In May 1974, the Acting Regional Director granted the amendment of certification. Respondent then requested review by the Board of that decision. In July 1974, the Board (Member Kennedy dissenting) denied Respondent's request for review.

Since Respondent refused to bargain with the Union, the Union filed, in July 1974, a Section 8(a)(5) charge, and the Regional Director issued a complaint in August 1974. Respondent's answer of August 26, 1974, to the complaint asserted that the Board had erred in granting the amendment in Case 26-AC-24, and also declared that "additionally, during the material time herein, a majority of the unit employees presented a petition, containing 339 signatures of the affected employees, stating their rejection of the Charging Party as the representative. (Observe, Employer Exhibit No. 6 in Board Case No. 26-AC-24)." The reference here was to the so-called Krone petitions, discussed above, which had been signed by employees in February 1974, and which were identified, but not entered into evidence, in the hearing in Case 26-AC-24. In September 1974, the General Counsel filed with the Board a Motion for Summary Judgment, alleging that Respondent's defense was simply an attempt to relitigate the issues already raised and litigated in Case 26-AC-24. Thereafter, the Board issued an order transferring the proceedings to it and a notice to show cause why the General Counsel's motion should not be granted.

In its response to the Board's notice to show cause, Respondent again challenged the propriety of the amendment of certification and also again referred to the Krone petitions. The Respondent also brought to the Board's attention the decertification petition filed in Case 26-RD-280 on September 10, 1974.[67] While the motion for summary judgment was pending before the Board, the Respondent also filed with the Board a motion to accept and consider previously unavailable evidence regarding the procedure by which the employees had voted for affiliation with the Teamsters union.

In its Decision and Order of June 30, 1975 (218 NLRB No. 129), the Board considered the Respondent's proffer of additional evidence, but reaffirmed its conclusion reached in Case 26-AC-24 that the amendment of certification was proper. It went on to hold, however, that "neither the amended certification nor our order here should bar the processing of the timely filed decertification petition filed in a companion proceeding in Case 26-RD-280 which petition was dismissed by the Regional Director and is now on appeal to the Board." After concluding that, by refusing to recognize Local 1196 during the tenure of the Brewery Workers contract, Respondent had violated Section 8(a)(5), the Board stated:

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67 Dismissed by the Regional Director on September 12, which dismissal was thereafter appealed to the Board.

However, in view of the fact that only 81 [sic] employees in a unit of approximately 450 voted to approve affiliation with the Teamsters Union, and that subsequent to such election some 330 employees allegedly disclaimed any desire to be represented by the Teamsters Union, we have concluded that a question of representation has been properly raised and that, despite our finding of a refusal to bargain during the term of the contract which has expired and in order to effectuate the policies of the Act, the employees in the bargaining unit should not be foreclosed from an opportunity to accept or reject continued representation by the Teamsters Union through the orderly processes of a secret ballot election. In the special circumstances herein, we are constrained to grant the General Counsel's motion for summary judgment but to limit our finding of violation and remedy to a failure to recognize the Union and to give full effect to such contract in that the dues withheld by the Company should have been turned over to the Teamsters Union pursuant to the terms of the contract. Accordingly, we shall dismiss the allegations of the complaint referring to a continuing refusal to bargain and shall separately order the decertification petition in Case 26-RD-280 be reinstated for further processing.

The Board thus cut short the bargaining obligation of Respondent to Local 1196 as of the expiration date (November 12, 1974) of the previously existing Brewery Workers contract, and ordered reinstatement of the decertification petition in Case 26-RD-280.[68] Since the Board ordered reinstatement and further processing of the decertification petition, its order limiting the bargaining obligation of Respondent to Local 1196 was clearly premised on the notion that the decertification petition raised a question concerning representation which suspended, but did not necessarily terminate, the representational rights of Local 1196. Had the Board considered that those rights had somehow expired, it would not have ordered further processing of the decertification petition, since expiration of the right to represent would have mooted the necessity for processing the decertification petition.[69]

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68 Member Kennedy dissented.

69 The Board's reference to the "330 employees [who] allegedly disclaimed" Teamster representation obviously means the documents secured in September 1974 by an employee named Cox which were filed in support of the decertification petition, rather than the petitions secured by Krone in February 1974. Thus, the Board refers to these 330 disclaimers as having been signed "subsequent" to the March affiliation election; and in its subsequent ruling of September 22, 1975, discussed below, the Board stated that its June 30 Decision and Order "alluded [to the petition in Case 26-RD-280] as a factor in finding the existence of a question concerning representation." I note also that at page 4 of its decision at 218 NLRB No. 129, the Board referred to the Respondent's request "that the Board take official notice of Case 26-RD-280, in which allegedly approximately 330 of the approximately 450 unit employees signed a statement of their opposition to representation by the Union."

On July 29, 1975, the Charging Party filed a motion for reconsideration of 218 NLRB No. 129, alleging that the February (Krone) petitions were tainted by employer interference; that the September 1974 petitions in support of the decertification petition were obtained by Cox, allegedly a supervisor; and that if the Board was going to make its decision to terminate the bargaining obligation on the basis of such petitions, it should not do so without "any facts in the record or without the Charging Party having an opportunity to present information of the employer's unlawful influence." On August 8, 1975, the Respondent filed a motion for clarification and/or reconsideration of the Decision and Order, arguing that the "question of representation" in fact arose in "January, February, and March of 1974," and not only in November.

On September 22, 1975, the Board denied the Charging Party's motion, stating, *inter alia:*

> In its Decision, the Board made no findings with regard to the validity of the petition in Case 26-RD-280 or of the statement opposing representation by Charging Party which had been filed therewith, but rather alluded thereto as a factor in finding the existence of a question concerning representation. Further, the issue of improper solicitation or [sic] the statement, if any, is a matter to be resolved in Case 26-RD-280 where the petition, previously dismissed by the Regional Director, was reinstated.

Also on September 22, the Board denied the Respondent's motion, finding that it raised nothing not previously considered.

On October 1, 1975, the Regional Director solicited withdrawal of the petition filed in Case 26-RD-280. At the instant hearing, counsel for the General Counsel stated that, in the Region's investigation of the petition, it was determined that "there was an insufficient of showing of interest," that such determination had been communicated to the Board itself, and that the Board had "directed the Regional Director to seek the withdrawal of that petition and if there was no withdrawal forthcoming, to dismiss it." Petitioner Cox submitted a request for withdrawal on October 3, which was approved by the Regional Director on October 6, 1975.

At this point, it seems that it would have been appropriate for the General Counsel to seek to set aside 218 NLRB No. 129 and to reopen Case 26-CA-5213. The Board's prior limitation, in 218 NLRB No. 129, of the bargaining obligation of Respondent had been, as set out above, based on "the fact that only 81 employees in a unit of approximately 450 voted to approve affiliation with the Teamsters Union, and that subsequent to such election some 330 employees allegedly disclaimed any desire to be represented by the Teamsters Union." The first factor thus cited by the Board was one which

it had rejected as a relevant consideration in reaching its conclusion that the certification had been properly amended, as Member Kennedy pointed out in his dissenting opinion, and I assume that, having just reaffirmed in the preceding paragraph of its June 30, 1975, Decision the propriety of the amendment of certification, the Board did not intend to reverse itself three sentences later.[70]

The second factor leading the Board to limit the bargaining obligation — "that subsequent to such election some 330 employees allegedly disclaimed any desire to be represented by the Teamsters Union" — referred, as discussed, to the written petitions underlying the formal decertification petition in Case 26-RD-280. Once it had been administratively determined that these petitions did not constitute a sufficient showing of interest, it would seem to follow that the bargaining obligation was instantly, and *ab initio*, revitalized. Clearly, the rule cannot be that the mere filing of a decertification petition, accompanied by alleged signatures of alleged employees who allegedly desire to oust a union, gives rise to a question concerning representation which effectively and permanently extinguishes the preexisting bargaining obligation, regardless of a subsequent determination that the petition is not adequately supported by a showing of interest. Otherwise, it would be within the power of any employee to sever a bargaining relationship simply by filing a decertification petition with supporting signatures, regardless of

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70 Since the Board in fact entered a bargaining order, it is patent that it did not so intend.

the spurious nature of the showing of support. The Board held in *Telautograph Corporation*, 199 NLRB 892, that a real question concerning representation is raised by the timely filing of a decertification petition but "the rule does not apply in situations where, because of contract bar, certification year, *inadequate showing of interest*, or any other established reason, the decertification petition does not raise a real representation question." (Emphasis added.)

On October 9, 1975, by motion to set aside the Board order in 218 NLRB No. 129, the Charging Party brought to the Board's attention that the Region had issued a complaint in three other cases involving this Respondent, "Specifically, Case No. 26-CA-4991, 26-CA-5620, and 26-CA-5729 which if the allegations are proven will establish that the employer, prior to the affiliation vote in March 1974, was unlawfully soliciting employees to not support the Teamsters; that the employer did unlawfully solicit employees' signatures in an effort to decertify the Union, and massive other forms of unlawful conduct, including removing employee notices posted on the bulletin board." The Charging Party also pointed out that the decertification petition in Case 26-RD-280 had been withdrawn, a fact of which the Board was undoubtedly aware, since, as discussed above, it had authorized the withdrawal procedure.[71]

71 In a supplement to the motion, Charging Party asserted that the Board had placed "heavy reliance" on the petition in its June 30 Decision, a contention paraphrased by the Board in its November 28 Order.

On November 28, 1975, the Board, as noted, ordered that "the impact of Cases 26-CA-4991, 5620, and 5729 on Case 26-CA-5213 must be considered." The Board accordingly granted the Charging Party's motion and ordered that Case 26-CA-5213 be consolidated for hearing with the other cases then already underway before me.

When the hearing resumed on December 1, I was informed of the remand contained in the Board's November 28 order. By that time, Charging Party had attempted to subpoena from the Respondent and from Richard Cox copies of the February and September petitions signed by employees. Respondent was resisting the subpoenas and moved to quash them. Since the Charging Party's successful motion to the Board had alleged that Respondent had unlawfully solicited employees to decertify the Union and has posited that the Board's Order in Case 26-CA-5213, which apparently rested on the existence of some of the petitions, might be affected by Respondent's interference with such petitions, it seemed to me to be a natural implication of the Board's order remanding the case, on the basis of the Charging Party's motion, that the Charging Party should have the opportunity to obtain copies of the petitions in order to attempt to establish that the petitions had been tainted as alleged. I therefore denied the motion to quash the subpoenas.

The case was then postponed for several months. In the interim, counsel for the General Counsel appealed

to the Board my ruling on the subpoenas, contending that it was unnecessary for the Charging Party to have access to the petitions sought. On February 2, 1976, the Board issued a telegraphic order reversing my ruling and quashing the subpoenas "because, under the particular circumstances herein, the employee petitions sought to be subpoenaed are not relevant."

Thereafter, in presenting its case, the Respondent attempted to introduce the Krone and Cox petitions, containing alleged employee signatures, into evidence. Considerable argument ensued, with the General Counsel taking the position that the petitions were not admissible under the Board's order of November 28, 1975, on the theory that since the Board had only decreed that "the impact of Cases 26-CA-4991, 5620, and 5729 on Case 26-CA-5213 must be considered," that mandate did not permit Respondent to erect new defenses to the Section 8(a)(5) allegation on the basis of the employee petitions signed in February and September 1974, and also on the theory that the Board's quashing of the Charging Party's subpoenas for the petitions was decisive as to their irrelevancy. Since Respondent had since January 1974 refused to recognize the Teamsters as the legal successor to the Brewery Workers, Respondent could not convincingly take the position that it had in any significant way relied on the petitions, and Respondent's counsel commendably so stated during the course of argument: "There will be no testimony that anyone relied on that petition as a

thing in formulating a legal decision at that time." It appeared to be Respondent's position that the existence of the petitions themselves, which existence was known to Respondent, gave rise to cognizable questions concerning representation, or perhaps abstractly reinforced Respondent's doubt about the representative status of the Teamsters Local. Counsel for Charging Party noted that if Respondent was allowed to introduce the petitions, Charging Party would be entitled to, and would, challenge the validity of the petitions as any sort of basis for withholding recognition and would show that supervisors had participated in the circulation of the petitions, that signatures were secured by fraud and under duress, that signatures were forged, that signatures belonged to employees who were allegedly supervisors, etc. A voluminous offer of proof was made by Charging Party before the hearing ended as to what it would establish if the petitions were admitted into evidence.

Ultimately, I concluded that Respondent should not be allowed to introduce the petitions; they are now in the rejected exhibit file.[72] In granting the Charging

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72 It is true, as Respondent argued, that the Board "vacated" its original Decision in the refusal-to-bargain case, thereby seeming to open the case to all relevant evidence. On the other hand, the Board stated that it was doing so only to assess the "impact" of the new cases on Case No. 26-CA-5213. In any event, I feel bound in certain respects to adhere to the conclusions earlier reached by the Board as the law of the case. For example, I do not believe that the Board authorized me to consider *de novo* the question, already twice determined by it, of whether Local 1196 was a proper successor to Local 196.

Party's motion to reopen Case 26-CA-5213, the Board appeared to be offering the Charging Party a chance to expand the bargaining obligation which the Board had limited in its original Decision.[73] The Board, however, then ruled that the Charging Party should not be allowed to subpoena the petitions upon which the Board had relied in that Decision, thus seemingly denying Charging Party the opportunity to demonstrate what it had alleged.[74] Considering that it was Charging Party's motion which led to reopening of the case, the Board's ruling indicates even less reason to allow the Respondent to offer the petitions.

Respondent contends, however, that some recognition should be given to the Krone petitions of February 1974 and the Cox petitions of September 1974, of which Respondent was aware. I have noted that the Board's ruling that the Charging Party was not entitled to subpoena these petitions suggests that they are not to be considered relevant.

I further take note of the fact, as Respondent's counsel stated, that Respondent did not "rel[y] on that [decertification] petition as a thing in formulating a legal

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73 As noted, Charging Party's motion had pointed out that the Board had placed "heavy reliance" on the decertification petitions, and the Board seemed to acquiesce.

74 Had Respondent not chosen to attempt to introduce the petitions, the Board's ruling on the subpoenaed documents could have meant that Charging Party might never see the petitions on which the Board relied in its June 30 Decision and Order.

decision at that time"; i.e., at the time the petition came to Respondent's attention, Respondent had already, since January 1974, embarked on a steadfast course of refusing to recognize Local 1196 because of the alleged deficiencies in the amendment-of-certification procedure.

The Board's rules relating to the validity of withdrawal of recognition from an incumbent union require that the employer either prove a loss of majority status or demonstrate that the withdrawal was predicated upon a reasonably based doubt, supported by objective considerations, asserted in a "context free of unfair labor practices." *Nu-Southern Dyeing and Finishing, Inc.*, 179 NLRB 573, n. 1, enfd. in part 444 F.2d 11 (C.A. 4); *Terrell Machine Company*, 173 NLRB 1480, 1480-1481, enfd. 427 F.2d 1088 (C.A. 4); *Gulfmont Hotel Company*, 147 NLRB 997, enfd. 362 F.2d 588 (C.A. 5). Presumably, Respondent is here contending, despite its concession that it "formulat[ed] [no] legal decision" on the basis of the petitions, that they nonetheless constituted "objective considerations" upon which Respondent may now rely.

Two principles which have evolved under the withdrawal-of-recognition doctrine come into play here. One is the rule that an employer who withholds recognition may rely for justification only on facts known to him at the time of withholding. As the Court stated in *N.L.R.B.* v. *Gulfmont Hotel Company*, 362 F.2d 588, 589

(C.A. 5) (emphasis added): "[W]hen the Board makes this determination [as to the basis of the employer's doubt] it is not controlled, or even guided, by the later ascertained facts of union adherence and non-adherence. It is rather the question of fact whether the company had a reasonable basis *at the time of its refusal to bargain* for believing that majority support of the bargaining union no longer existed." In *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho*, 213 NLRB 651, 653, the Board recited with approval the foregoing language and, as well, quoting from *Terrell Machine Company* v. *N.L.R.B.*, *supra*, 427 F.2d at 1090, held that where an employer "did not know of the actual minority of union members until after its refusal to bargain, it cannot rely on that data to support a reasonably based doubt of continued majority support." Continuing to stress this point in *Bartenders, supra*, at 653-654, the Board said:

> The dissent's basis for 'serious doubt,' i.e., knowledge of the Union's membership size, does not justify Respondent's withdrawal of recognition under the Board's settled principles, *acquired as it was by Respondent after the refusal to bargain.*
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> * * *
>
> [T]he time for ascertainment of [the employer's reasonably based doubt] must be *at the time of the refusal to bargain, not thereafter*, at a hearing, as the dissent would allow.
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> * * *

> Thus, whatever test our dissenting colleague wishes to apply must be applied to *facts and events known to an employer before it withdraws recognition and not thereafter.* No court has sanctioned anything else.
>
> (Emphasis added.)

It thus appears to be the clear position of the Board and the courts, previously cited, that an employer who withdraws recognition must litigate his right to do so on the basis of the facts known to him at the time, and may not rely on data either discovered or occurring thereafter. The language employed by the Board and the courts would seem to require even the rejection of what otherwise might be considered the most impressive sort of after-acquired evidence of employee disaffection; the rule, however, seems sensible. Notorious withdrawal of recognition may very likely spawn, during the often long delay between charge and hearing, visible evidence of employee discontent; to allow the employer to seize upon such evidence as additional fortification for its earlier refusal to bargain is plainly unjustifiable, as well as an incentive to the disruption of orderly labor relations. See *Windemuller Electric, Inc.*, 180 NLRB 686, n. 1: "The Respondent's refusal to bargain over the bonus and pension plan, in violation of Section 8(a)(5) and (1) of the Act, predated the filing of the [decertification] petition, and hence the Respondent cannot rely on that petition, which could have resulted from Respondent's unlawful conduct."

The Court of Appeals for the Fifth Circuit adopted this approach in a case similar to this one, *N.L.R.B.* v. *Newspapers, Inc.*, 515 F.2d 334, enfg. 210 NLRB 8. There, as here, the employer refused to bargain with a successor union, denying that it was a legal continuation of the certified representative. The Board and Court found a successorship. The Court also advanced the following reasoning in holding that the employer was not entitled to rely upon events occurring subsequent to its original refusal to recognize the successor union:

> Similarly, we reject the Employer's claim that because its work force had expanded once again during the pendency of this litigation, it ought to be absolved of the Board's bargaining order. In any number of similar cases employers have made the claim that delay in completing the Board's unfair labor practices proceedings should prevent a Board bargaining order from being enforced due to turnover and change in the employer's work force. Invariably an employer making such an argument does so in terms of its concern for its employees' rights of free choice. See e.g., *N.L.R.B.* v. *Schill Steel Products, Inc.*, 480 F.2d 586, 591 (5th Cir. 1973). While it is true that the employer here has not demonstrated the type of extreme hostility to unionization as the respondent in *Schill*, nonetheless in our view *the law is settled that events subsequent to the unlawful*

refusal to bargain cannot be posed as a defense to a subsequent bargaining order. As the Supreme Court observed in *N.L.R.B.* v. *Katz*, 369 U.S. 736, 748, n. 16, 82 S.Ct. 1107, 1114, 8 L.Ed.2d 230 (1962) 'Inordinate delay in any case is regrettable but Congress has introduced no time limitation into the Act except that in §10(b)' and as the Court emphasized in *Franks Bros.* v. *N.L.R.B.*, 321 U.S. 702, 705-6, 64 S.Ct. 817, 819, 88 L.Ed. 1020 (1944), the temporary nature of a bargaining order merely insures that a 'bargaining relationship once rightfully established [is] given a fair chance to succeed.' Thus the general rule is that the presumption of actual majority status continues 'during the period of litigation of the contemporaneous unfair labor practices, and for a reasonable period of time after they have been remedied, in order to give the bargaining relationship . . . a reasonable chance to operate and succeed without outside interference or improper pressure.' *N.L.R.B.* v. *Rish Equipment Co.*, 407 F.2d 1098, 1100 (4th Cir. 1969); *N.L.R.B.* v. *Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091 (8th Cir. 1969); *N.L.R.B.* v. *John S. Swift Co.*, 302 F.2d 342, 346, (7th Cir. 1962).

(515 F.2d at 341-342; emphasis added.)

Accordingly, as in *Newspapers, Inc., supra,* since Respondent, at the outset, refused to afford recognition to the legal successor of Local 196 because of claim-

ed defects in that successorship, the foregoing principles lead me to conclude that it must rest its case solely on that question, and may not rely on any subsequently-acquired knowledge of later employee petitions. The point may be moot, however, since, as indicated, Respondent conceded that it based no "legal decision" on these petitions.

Furthermore, as set out above, the relevant decisional doctrine requires that a valid withdrawal of recognition may occur only "in a context free of unfair labor practices." I have above found sponsorship by Respondent of the Krone petitions, and threats against and benefits offered to employees Mills, Money, and Jackson in February 1974; when Krone formally presented the petitions to Donaldson in March 1974, he, and Respondent, could scarcely have claimed a good-faith belief that the signatures on them were a product of employee free choice, untainted by employer interference.

It cannot so easily be said that the foregoing unfair labor practices also infected the Cox petitions, presented in support of the RD petition in September 1974, since the earlier unfair labor practices had by that time been formally, if temporarily, "remedied" by a settlement agreement. However, as discussed, Respondent conceded that it did not "rel[y] on that petition as a thing in formulating a legal decision at that time"; as also discussed, the Cox petitions fall within the ambit of the *Bartenders Association* principle.

Furthermore, even passing the acknowledgement that Respondent never "formulat[ed] a legal decision" on the basis of the Cox petitions, the fact that those petitions were, after administrative investigation, found to be inadequate to constitute a demonstration of interest supportive of a decertification petition indicates that if the Cox petitions ever might have constituted a basis for withdrawing recognition, that basis terminated in October 1975, when the petition in Case 26-RD-280 was ordered dismissed.[75]

It thus seems that Respondent is precluded from relying upon the Krone and Cox petitions in defending against the Section 8(a)(5) allegation. It further appears that, under the *Telautograph Corporation* rule, *supra*, even if Respondent had relied upon the filing of the decertification petition in September 1974, which it says it did not, its obligation to recognize Local 1196, the legal successor to Local 196, would have continued unabated. Thus, in *Telautograph*, the Board held that the timely filing of a decertification petition will raise a real question concerning representation. It further held,

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75 In *Automated Business Systems, A Division of Litton Business Systems, Inc.*, 205 NLRB 532, 533, the Board held that information received by an employer that a decertification petition has been filed with a showing of support by a majority of the unit employees "may have been enough to justify a doubt." Although the *Bartenders Association* doctrine makes the *Litton* decision inapplicable here, if *Litton* were to be applied, I would find that a bargaining order would be nonetheless appropriate here in view of the several violations of Section 8(a)(3) and (1) committed by Respondent in 1975, on the theory propounded by the Board in finding appropriate such an order in *Litton*.

however, that even in the face of such a petition, "the incumbent union may still continue to administer its contract and process grievances." 199 NLRB at 892. Since the Board held in its Decision and Order of June 30, 1975, in Case No. 26-CA-5213, that Local 1196 was a legal successor to Local 196, it would seem that the filing of the decertification petition should not, under the *Telautograph* doctrine, have brought an end to the obligation to recognize Local 1196 as of November 12, 1974; rather, even after that date, the Union was still entitled to "process grievances" and, presumably, to otherwise act as exclusive representative with the exception of the right to engage in contract negotiations, awaiting final action on the decertification petition. The issue is, however, academic, since the evidence shows that Respondent did not rely on the petition and, in any event, the *Bartenders Association* line of cases precluded such reliance.

Accordingly, I conclude that Respondent has, since May 7, 1974,[76] and at all times thereafter, refused to recognize and bargain collectively with Local 1196 as the exclusive representative of the employees in the appropriate unit and has refused to honor the collective-bargaining agreement with the Union by not forwarding to it monies deducted from the wages of employees pursuant to dues-checkoff authorization

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76 The date used by the Board in its Decision and Order at 218 NLRB No. 129.

cards executed by said employees, in violation of Section 8(a)(5) and (1) of the Act.[77]

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77 If the Board disagrees with my conclusion, and holds that Respondent is entitled to rely upon the Cox petitions, I see no justification for prolonging this complex and protracted litigation by a remand for the purpose of accepting the petitions in evidence and allowing the Charging Party to present its complicated and undoubtedly exhaustive attack on the petitions, including the claims of alleged signatures of alleged supervisors thereon, fraud and coercion in procuring signatures, etc., occurring in 1974.

It appears from the record that General Counsel has refused to issue a complaint on charges that Respondent unlawfully assisted in the solicitation of the Cox petitions. If the Board were to hold, for some reason which I do not now forsee, that Respondent was entitled to rely on the Cox petitions as an "objective consideration" for continuing to withhold recognition, at best its right to do so would seemingly have expired in October 1975, when the petitions were found to be inadequate to support the decertification petition, at which time the bargaining obligation would have revived (as noted, however, the *Telautograph* decision seems to say that the duty to *recognize* did not cease with the filing of the petition, merely the duty to bargain). The Board's June 30 Decision made clear that the termination of the obligation to recognize was based essentially on the vitality of the decertification petition, which would give employees "an opportunity to accept or reject continued representation by the Teamster Union through the orderly processes of a secret ballot election." The only interim rights conceivably affected might be those of the three strikers, Lambe, Rainey, and Baiel; but even assuming that it could somehow be said (although on these facts, I do not see how) that they were only economic strikers, they would be entitled to the remedies here recommended, on the evidence presented. Even on the assumption that the Board's June 30 Decision created a hiatus in the bargaining obligation until the decertification petition was withdrawn on October 6, the strikers would have still been unfair labor practice strikers during that period on my finding that the strike was, at least in part, in protest of the discharge of Jackson; and, of course, the discriminatory treatment of the strikers on and after July 15 may be said to have aggravated and prolonged the strike.

I note that in *Litton*, the Board held that the employer could rest a doubt on facts reported to it that the decertification petition was

Conclusions of Law

1. Respondent, the Coca-Cola Bottling Company of Memphis, is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196, is a labor organization within the meaning of Section 2(5) of the Act.

3. By aiding, encouraging, and assisting an employee in circulating anti-union petitions in February 1974; by offering benefits to and threatening employee John Mills in order to induce him to circulate an anti-union petition and to interfere with his protected concerted activities on or about January 31, February 4, and February 8, 1974; by giving employee John Mills an impression of surveillance of his protected concerted activities on February 8, 1974; by asking employee George Money to assist in circulating an anti-union petition on or about February 6, 1974; by asking employee Money why he did not get out of the

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accompanied by "cards" signed by majority of the employees. Here, as the Respondent's motions to the Board in Case 26-CA-5213 show, it was on notice that a majority of employees had allegedly signed petitions in support of the decertification petition in Case 26-RD-280. Charging Party has not included in its offer of proof any contention that it can establish that Respondent was aware of any defects in the Cox petitions. Thus, even if the Board should disagree with my treatment of the Cox petitions, it does not appear that further litigation of this case would be in order.

Union on or about February 7, 1974; by making threats and promises of benefits to employee Magnolia Jackson on February 7 and February 8, 1974; and by vilifying employees, promising to redress their grievances, and asking them to admit that they made a mistake by assisting the Union, on July 15, 1975, Respondent violated Section 8(a)(1) of the Act.

4. By discharging Magnolia Jackson on June 6, 1975; by refusing to reinstate Leo Rainey on July 16, 1975; by refusing to reinstate Stephen Baiel on July 16, 1975; and by refusing to reemploy Robert Lambe on July 16, 1975, Respondent violated Section 8(a)(3) and (1) of the Act.

5. The strike which began on July 7, 1975, was in its inception and continued thereafter to be an unfair labor practice strike.

6. The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at the Coca-Cola Bottling Company of Memphis, Tennessee, operation, including driver-salesmen, driver-helpers, helpers, relief drivers, pre-mix, advertising, garage, cooler and fork-lift employees, excluding office clerical employees, guards, professional and

technical employees and supervisors as defined in the Act.

7. By refusing on or about May 7, 1974, and at all times thereafter, to recognize and bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, and by refusing to honor and abide by the collective-bargaining agreement between Respondent and the Union, Respondent violated Section 8(a)(5) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent has committed no unfair labor practices alleged in this complaint except as set out above.

The Remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Magnolia Jackson on June 6, 1975, I shall recommend that Respondent offer her immediate and full reinstatement to her former job or, if that job no long-

er exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of the discrimination against her, by payment to her of a sum of money equal to that which she normally would have earned from the aforesaid date of her termination to the date of Respondent's offer of reinstatement, less her net earnings during such period. The backpay provided herein shall be computed on a basis of calendar quarters in accordance with *F. W. Woolworth Company*, 90 NLRB 289, with interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Having found that Respondent unlawfully refused to reemploy Robert Lambe on July 16, 1975, I shall recommend that the foregoing remedial provisions be made applicable also to him. Although I find that Lambe quit his employment on July 15, he is still entitled to a restoration of his seniority and such other rights and privileges which would have accrued to him as an employee thereafter, since, had Respondent not refused to reemploy him, he would have accrued such seniority, rights and privileges.

I have found that Respondent unlawfully failed and refused to restore unfair labor practice strikers Leo Rainey and Stephen Baiel to their former jobs in a timely fashion. The record indicates that at the time of the hearing, Rainey and Baiel had been fully reinstated.

However, the record does not indicate that Rainey and Baiel were made whole, and it may be that their rights and privileges have not been fully restored. I shall therefore recommend that Respondent be required to make each of them whole in accordance with the foregoing remedial provision, with the exception of an offer of reinstatement.[78]

Having found that Respondent has been obligated since May 7, 1974, to bargain with the Union, I shall order that it be required to cease and desist therefrom and to recognize and bargain collectively with the Union, and to turn over to the Union the dues checked off under the contract which expired on November 12, 1974.

Respondent's unlawful activities, including discriminatory conduct with respect to the tenure of employment of Magnolia Jackson and the treatment of strikers Lambe, Rainey, and Baiel, make appropriate an order requiring Respondent to cease and desist from in any manner impinging upon the rights of the employees guaranteed by the Act. *N.L.R.B.* v. *Express*

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78 Rainey and Baiel applied for reinstatement on July 15, 1975. As previously discussed, in *Television Wisconsin, Inc.*, 224 NLRB No. 96, n. 3, the Board commenced the backpay period of the unfair labor strikers there involved from "the date on which their unconditional request for reinstatement was made, rather from 5 days thereafter as set forth in paragraph 3 of the Remedy section of the Administrative Law Judge." Since the discussion of the reinstatement of Rainey and Baiel was held in the afternoon of July 15, I shall recommend that their backpay period begin as of July 16.

Publishing Company, 312 U.S. 426; *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532 (C.A. 4).

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[79]

ORDER

Respondent, The Coca-Cola Bottling Company of Memphis, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, refusing to reemploy, refusing to reinstate, or otherwise discriminating against employees in regard to their hire, tenure of employment, or other terms and conditions of employment in order to discourage membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196 ("the Union"), or any other labor organization.

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79 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Aiding, assisting, or encouraging employees to circulate petitions designed to discourage membership in or other activity on behalf of the Union or any other labor organization.

(c) Threatening or vilifying employees to discourage membership in or other activity on behalf of the Union or any other labor organization.

(d) Offering benefits to employees to discourage membership in or other activity on behalf of the Union or any other labor organization.

(e) Creating the impression that it is keeping under surveillance the union activities of its employees.

(f) Refusing to bargain collectively concerning rates of pay, hours of employment, and other terms and conditions of employment with the Union as the exclusive bargaining representative of the employees in the appropriate bargaining unit set out below:

> All production and maintenance employees at the Coca-Cola Bottling Company of Memphis, Tennessee, operation, including driver-salesmen, driver-helpers, helpers, relief drivers, pre-mix, advertising, garage, cooler and fork-lift employees, excluding office clerical employees, guards, professional and technical employees and supervisors as defined in the Act.

(g) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Magnolia Jackson and Robert Lambe immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make each of them whole for any loss of earnings he or she may have suffered by reason of Respondent's unlawful discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Make Leo Rainey and Stephen Baiel whole for any loss of earnings, seniority, or other rights and privileges they may have suffered between July 16, 1975, and the dates of their reinstatement, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Upon request, bargain collectively with the Union as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, hours of employment, and other terms and conditions of employment.

(d) Pay to the Union all monies deducted from the wages of employees pursuant to dues-checkoff authorization cards as required by the collective-bargaining agreement which expired on November 12, 1974, together with interest thereon at the rate of 6 percent per annum.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this recommended Order.

(f) Post at its Memphis, Tennessee, facility copies of the attached notice marked "Appendix B."[80] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken

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80 In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the allegations in the complaint be dismissed except insofar as specific findings of violations based on those allegations have been made above.

Dated Washington, D.C.

/s/ BERNARD RIES
Bernard Ries
Administrative Law Judge

Although I would not attempt to make all the emendations required by this transcript, the following corrections are among the more material not noted by General Counsel, and the transcript is corrected accordingly:

Page and Line		From	To
Page 4	line 9	Your	The
7	24	eluded	alluded
24	1	satisfied	set aside
24	25	sanction in	section to
25(2)	16	crust	thrust
25(2)	20	hours	months
26	12	clause of the	clause, the
35	11	were to	were I to
35	12	and tried	and he tried
35	15	afoul what	afoul of what
36	9	these informational	these are informational
37	11-12	deletions. Paragraph	deletions have been made in paragraph
37	13	we	We

Page and Line		From	To
41	11	on	for
45	12	rehired	hired
45	17	883	8(a)(3)
46	1	proposed	to propose
46	4	result in	resolve the
49	12	bond	clause
49	16	was fired	expired
49	18	and taking another form.	I'm taking in another forum.
49	23	did hear	have
60	1	1196	196
60	3	1196	196
60	9	1196	196
65	24	these proceedings	this procedure
66	2	these proceedings	this procedure
73	24-25	voice I	voice, I
75	18	Whitie	whitey
76	16	me just	me-just
76	17	being outright	being an outright
		belligerent on ruly	belligerent unruly
77	23	application	affidavit
97	14	recall with	recall. With
100	21	form here	forum here for
144	21	rather	gather
145	17	is	has

Page and Line		From	To
156	10	If the	The
156	12	forbadem	verbatim
156	14	acquietive	cumulative
166	2	a fair legal	an unfair labor practice
166	3	irrelevant	a relevant
166	15	would deny	were denied
167	7	inquiring	inclined
167	8	machine	subpoena
170	9	do you have	you have had
170	24	18 NLRB	218 NLRB
174	1	120	129
174	17	Ward	Board
176	16	notes	notices
177	1	worker	work
179	2	conceive	pursue
179	9-10	in terminals	determine
186	8	Donaldson	Brackhahn
186	17	by relation	violation
194	14	that. He just received	that, we just receive
203	18	the advice	before us
223	13	H-1	8(1)
223	16	H-1	8(1)
235	4	19	81
238	2	no authority	no alternative but
242	17	Eight	three

Page and Line		From	To
255	14	Randall	Randy
274	16	it. You	if you
287	13	stewards at	stewards present at
298	19	shop	chief shop
301	12	Donaldson	Brackhahn
321	20	It doesn't	Doesn't it
326	25	Objection	MR. LEVY: Objection
474	17	understand you have	understand. You don't have
481	19	present	represent
502	18	office?	office.
539	6	the strike was over	a strike over
555	9	candidate	captain
561	7	adamance	animus
578	18	evidence	affidavit
587	21	to	two
599	2	you had told me	had told you
599	3	you in the afternoon about my splitting my	him in the afternoon about splitting your
606	12	no	I know
624	9	want to	want us to
635	17	10	9
648	23	or	from
650	22	a subpoena	the subpoenas
651	3	petition	subpoena
654	4	in appearance	interference

Page and Line		From	To
661	6	case the	case with the
661	9	26-CA-5215	26-CA-5213
661	12	Regional Director. The	Regional Director, the
913	5	alliance	reliance
932	5	laws	law
935	5	of	on
1159	3	Paiel	Baiel
1169	4	embelishing	embellishing
1304	6	irrelevant	relevant
1476	13	did mail	did not mail
1573	21	vendetta	impression
1594	4	to her office	to your office
1604	10	was on	was no
1648	20	85	8(5)
1655	3	employer	employee
1690	6	made for that	made that
1690	23	opening would	opening. Would
1729	23	strikeman's conduct	strike misconduct
1731	12	strikeman's conduct	strike misconduct
1772	15	our	out-of-
1818	10	[change both "I" 's to "you"]	

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE
UNITED STATES GOVERNMENT

AFTER A TRIAL IN WHICH ALL PARTIES WERE REPRESENTED AND HAD THE OPPORTUNITY TO PRESENT TESTIMONY, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND HAS ORDERED US TO POST THIS NOTICE.

WE WILL NOT discharge, refuse to re-employ, refuse to reinstate, or otherwise discriminate against any employees in regard to their hire, tenure of employment, or any term or condition of their employment in order to discourage membership in INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION 1196, or any other labor organization.

WE WILL NOT threaten employees, offer benefits to employees, vilify employees, assist

employees in circulating petitions, coerce employees to assist in the circulation of petitions, coerce employees to sign petitions, or give employees the impression that we have been keeping their union activities under surveillance, in order to discourage membership in or other activity on behalf of the above-named Union or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

The appropriate bargaining unit at our plant is:

> All production and maintenance employees at the Coca-Cola Bottling Company at Memphis, Tennessee, operation, including driver-salesmen, driver-helpers, relief drivers, pre-mix, advertising, garage, cooler and fork-lift employees, excluding office clerical employees, guards, professional and technical employees and supervisors as defined in the Act.

WE WILL, upon request, bargain with the above-named labor organization as the ex-

clusive representative of all employees in the aforesaid appropriate bargaining unit with respect to rates of pay, hours of employment, and other terms and conditions of employment of the employees included within the appropriate bargaining unit.

WE WILL pay to the above-named labor organization all monies we have deducted from employees' wages pursuant to dues checkoff authorization cards from said employees from May 7, 1974, to November 12, 1974, together with interest at the rate of 6 percent per annum, as we were required to do under the terms of the collective-bargaining agreement with the above-named labor organization.

WE WILL offer to MAGNOLIA JACKSON and ROBERT LAMBE immediate reinstatement to their former jobs, or if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and WE WILL make each of them whole for any loss of earnings they may have suffered by reason of our unlawful discrimination against them.

WE WILL make LEO RAINEY and STEPHEN BAIEL whole for any loss of earnings, senior-

ity, or other rights and privileges they may have suffered by reason of our unlawful discrimination against them.

THE COCA-COLA BOTTLING
COMPANY OF MEMPHIS
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Clifford Davis, Federal Building, Rm. 746, 167 N. Main St., Memphis, Tennessee 38103 (Tel. No. 901 - 222-3161).

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

THE COCA-COLA BOTTLING COMPANY
OF MEMPHIS

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA
LOCAL UNION 1196

Case: 26-CA-5213
26-CA-4991
26-CA-5620
26-CA-5729

Filed: Dec. 1, 1975

ORDER GRANTING MOTION

On June 30, 1975, the National Labor Relations Board issued a Decision and Order in Case 26-CA-5213,[1] in which it found, *inter alia*, that Respondent had violated Sections 8(a)(5) and (1) of the National Labor Relations Act, as amended, and ordered an appropriate remedy which it found would effectuate the policies of the Act. On September 22, 1975, the Board issued Orders denying (1) the Respondent's Motion for Clarification and/or Reconsideration of an Order of the

1 218 NLRB No. 129 (Member Kennedy dissenting).

Board and (2) the Charging Party's Motion for Reconsideration. On October 14, 1975, the Charging Party filed a Motion to Set Aside Board Order or to Modify submitting, *inter alia*, that the Regional Director had issued a complaint in Cases 26-CA-4991, 26-CA-5620, and 26-CA-5729 which, if the allegations are proven, would establish that the Respondent unlawfully solicited employees to decertify, and not to support the Charging Party and submitting further that the decertification petition in 26-RD-280, upon which the Board heavily relied in its Decision and Order, had been withdrawn. Thereafter, on October 20, 1975, the Respondent filed a Response to Motion to Set Aside Board Order alleging in substance that the Charging Party's Motion is untimely reargument, not based on newly discovered or previously unavailable evidence and without support in the record.

Pursuant to the provision of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon due consideration of the entire matter, including particularly the complaint in Cases 26-CA-4991, 5620 and 5729 and the withdrawal of the decertification petition in Case 26-RD-280, the Board unanimously agrees that the impact of Cases 26-CA-4991, 5620, and 5729 on Case 26-CA-5213 must be considered. Members Fanning and Penello are of the opin-

ion that the Charging Party's Motion should be granted at this time, the Board's Decision and Order in Case 26-CA-5213 vacated, the General Counsel's Motion for Summary Judgment denied and the complaint in Case 26-CA-5213 consolidated for hearing with Cases 26-CA-4991, 5620, and 5729. Contrary to Chairman Murphy, Members Fanning and Penello decided to rule upon the Charging Party's Motion at this time in order to process most expeditiously Case 26-CA-5213 and to avoid potential delay. Awaiting the Decision of the Administrative Law Judge in the other consolidated cases currently being heard would unduly delay final determination of Case 26-CA-5213 especially if, as may well be, issues remain which the Administrative Law Judge's Decision may not have resolved and which would necessitate a subsequent remand to the Administrative Law Judge. Accordingly,

IT IS HEREBY ORDERED that the Charging Party's Motion to Set Aside Board Order or to Modify be, and it hereby is, granted.

IT IS FURTHER ORDERED that the Board's Decision and Order of September 22, 1975, be, and it hereby is, vacated and that the General Counsel's Motion for Summary Judgment therein be, and it hereby is, denied.

IT IS FURTHER ORDERED that Case 26-CA-5213 be, and it hereby is, consolidated for hearing together

with Cases 26-CA-4991, 5620, and 5729 currently being tried before Administrative Law Judge Bernard Fies and that it be, and it hereby is, remanded for hearing with Cases 26-CA-4991, 5620, and 5729.

Dated, Washington, D.C., November 28, 1975.

John H. Fanning, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

218 NLRB No. 179 D-149
Memphis, Tenn.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

THE COCA-COLA BOTTLING
COMPANY OF MEMPHIS

and Case 26-CA-5213

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,
LOCAL UNION 1196

DECISION AND ORDER

Upon a charge and amended charge filed on July 22, 1974, and August 5, 1974, respectively, by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196, herein called the Union, and duly served on The Coca-Cola Bottling Company of Memphis, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 26, issued a complaint on August 19, 1974, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6)

and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

The complaint alleges, in substance, that in Case 26-AC-24[1] the name of the Union herein had been substituted on the certification previously issued the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, hereafter the International Brewery Workers, and that thereafter Respondent had refused to recognize and bargain with the Union and had refused to honor a term of its collective-bargaining agreement requiring it to forward to the Union dues it had deducted from employee wages pursuant to dues-checkoff authorization cards. Respondent filed an answer to the complaint, admitting in part and denying in part the allegations of the complaint.

On September 3, 1974, the General Counsel, by counsel, filed with the Board a motion to transfer the proceedings before it and a motion for a summary judgment, submitting, in effect, that by its answer to the complaint Respondent was attempting to relitigate issues raised and litigated in Case 26-AC-24, and re-

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1 Official notice is taken of the record in the representation proceeding, Case 26-AC-24, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va., 1957); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

quested that the Board issue an order requiring, *inter alia*, that Respondent bargain with the Union and forward to the Union the moneys it had been deducting as dues from employee wages as required by the collective-bargaining agreement. On September 13, 1974, the Board issued an order transferring the proceedings before it and a notice to show cause why the General Counsel's motion should not be granted. On October 2, 1974, Respondent filed a response to the notice to show cause.

On February 24, 1975, Respondent filed a motion to the Board for acceptance and consideration of previously unavailable evidence. On March 3, 1975, the General Counsel filed an opposition to Respondent's motion. After due consideration the Board has concluded that it will accept Respondent's motion and attachments as part of the record in this case.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Review of the record herein, including that of Case 26-AC-24, reveals that Respondent had a collective-

bargaining agreement with Brewery Workers Local 196 which expired on November 12, 1974. On December 31, 1973, the International Brewery Workers and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereafter referred to as Teamsters International, merged on the International level, and as a result thereof the Teamsters International chartered Brewery Workers Local 196 as Teamsters Local Union 1196, the Union herein. On March 3, 1974, the Union conducted an election to determine whether the unit employees wanted to affiliate with the Teamsters International Union. Of the 81 unit employees who voted, 78 favored affiliation. Thereafter, the Union filed a petition in Case 26-AC-24 to amend the Brewery Workers certification to reflect the name of the new local and its affiliation. Respondent opposed the petition on the ground that there were irregularities in the election, and because the Union limited the balloting to unit employees who had executed either Teamsters or Brewery Workers checkoff authorization cards, thereby rendering the results of the election nonrepresentative of all the unit employees. On May 7, 1974, the Acting Regional Director issued a Decision and Amendment of Certification in which he found no merit in Respondent's contentions and amended the certification. Thereafter, Respondent requested review by the Board of the Acting Regional Director's de-

cision. On July 9, 1974, the Board denied Respondent's request for review as it raised no substantial issues warranting review.[2]

In this proceeding, Respondent reasserts its contention that the affiliation election was invalid, since the voting was limited only to those employees who had signed checkoff authorization cards, and requests that the Board take official notice of Case 26-RD-280, in which allegedly approximately 330 of the approximately 450 unit employees signed a statement of their opposition to representation by the Union.

Respondent's subsequent motion to consider previously unavailable evidence points out certain portions of the minutes of the Union's meetings contending that they establish that the charter of the new Teamsters Local was issued prior to the vote of the union members on affiliation and that the belated vote thereon did not validate such action, citing the Board's decision in *Carriage Oldsmobile Cadillac, Inc.*, 210 NLRB No. 98 (1974).

With respect to Respondent's contention that the election to approve affiliation with the Teamsters Union was invalid because the voting was limited only to those employees who had signed checkoff authorization cards for either the Teamsters or Brewery

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2 Member Kennedy dissenting.

Workers Union, the Board had previously affirmed the Regional Director's amendment of the certification in Case 26-AC-24 and thus upheld the validity of the election. Consequently, Respondent is attempting to relitigate an issue previously considered by the Board. Under well-settled rules precluding relitigation in unfair labor practice proceedings of issues which were raised and litigated in previous representation proceedings, Respondent may not properly raise this issue as a defense in this proceeding.[3] We have considered, nonetheless, the minutes of union meetings submitted by Respondent as previously unavailable evidence and have concluded that it does not warrant a reversal of our previous conclusion that the election was valid for purposes of amending the certification. For reasons enunciated hereafter, however, we further conclude that neither the amended certification nor our order here should bar the processing of the timely filed decertification petition filed in a companion proceeding in Case 26-RD-280 which petition was dismissed by the Regional Director and is now on appeal to the Board.

Respondent admits the allegations of the complaint[4] that it refused to recognize and bargain with the Union

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3 See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

4 In its answer to the complaint, Respondent denies the allegation that the Union is a labor organization within the meaning of the Act. However, the Union's status as a labor organization was specifically determined in Case 26-AC-24 and may not be relitigated herein. *Cherokee Nitrogen Company*, 200 NLRB 630 (1972).

during the term of the contract and further concedes that it withheld from the Union dues deducted from employee wages pursuant to checkoff authorizations. By such conduct, we find that Respondent violated Section 8(a)(5) and (1) of the Act. However, in view of the fact that only 81 employees in a unit of approximately 450 voted to approve affiliation with the Teamsters Union, and that subsequent to such election some 330 employees allegedly disclaimed any desire to be represented by the Teamsters Union, we have concluded that a question of representation has been properly raised and that, despite our finding of a refusal to bargain during the term of the contract which has expired and in order to effectuate the policies of the Act, the employees in the bargaining unit should not be foreclosed from an opportunity to accept or reject continued representation by the Teamsters Union through the orderly processes of a secret ballot election. In the special circumstances herein, we are constrained to grant the General Counsel's motion for summary judgment but to limit our finding of violation and remedy to a failure to recognize the Union and to give full effect to such contract in that the dues withheld by the Company should have been turned over to the Teamsters Union pursuant to the terms of the contract. Accordingly, we shall dismiss the allegations of the complaint referring to a continuing refusal to bargain and shall separately order that the decertification petition in Case 26-RD-280 be reinstated for further processing.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent, a Tennessee corporation with an office and place of business in Memphis, Tennessee, is engaged in the bottling, sale, and distribution of soft drinks. During the past 12 months it purchased products valued in excess of $50,000 directly from points located outside the State of Tennessee.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Certification and Amendment to Certification*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at the Coca-Cola Bottling Company of Memphis, Tennessee, operation, including driver-salesmen, driver-helpers, helpers, relief drivers, pre-mix, advertising, garage, cooler and fork-lift employees, excluding office clerical employees, guards, professional and technical employees and supervisors as defined in the Act.

2. The certification and amendment to certification

On June 12, 1968, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 26, designated the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers as their representative for the purpose of collective bargaining with the Respondent, and said labor organization was certified on June 20, 1968, by the Regional Director. On May 7, 1974, said certification was amended in Case 26-AC-24 to change the name of the certified labor organization to that of the Union herein.

B. *The Request To Recognize and Bargain and Respondent's Refusal*

Commencing on or about May 7, 1974, and at all times thereafter, the Union has requested that Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about May 8, 1974, and continuing thereafter, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union, and refused to honor and abide by the terms of the collective-bargaining agreement with the Union by refusing to forward to it moneys deducted from employees' wages pursuant to dues-checkoff authorization cards from said employees, as required thereby.

Accordingly, we find that Respondent has, since May 7, 1974, and at all times thereafter, until November 12, 1974, refused to recognize and bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and has refused to honor the collective-bargaining agreement with the Union by not forwarding to it moneys deducted from the wages of employees pursuant to dues-checkoff authorization cards by said employees and required thereby.

IV. The Effect of the Unfair Labor Practices on Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union during the term of their collective-bargaining agreement and by refusing to honor the terms of said agreement by refusing to forward moneys deducted as dues from employees' wages pursuant to checkoff authorization cards by said employees, and also having found that a question concerning representation apparently exists which renders inappropriate the issuance of a broad bargaining order, we shall order that Respondent post appropriate-notices advising employees of the commission of the unfair labor practices so as to dissipate the effect thereof, and that Respondent pay to the Union all moneys deducted from employees' wages as dues from May 7, 1974, until November 12, 1974, together with 6-percent interest per annum thereon.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. The Coca-Cola Bottling Company of Memphis is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees at the Coca-Cola Bottling Company of Memphis, Tennessee, operation, including driver-salesmen, driver-helpers, relief drivers, pre-mix, advertising, garage, cooler and fork-lift employees, excluding office clerical employees, guards, professional and technical employees and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. On May 7, 1974, the above-named labor organization became the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act by virtue of its name being substituted for that of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, a certified labor organization, Case 26-AC-24.

5. By refusing on or about May 7, 1974, and at all times thereafter, until November 12, 1974, to recognize and bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, and by refusing on or about May 7, 1974, to honor and abide by the collective-bargaining agreement by refusing to forward to the Union moneys deducted from employees' wages pursuant to dues-checkoff authorization cards as required thereby, Respondent violated Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, and to honor the collective-bargaining agreement, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. To the extent that allegations of the complaint may be construed to allege a continuing refusal to bargain after November 12, 1974, the expiration of the contract, such allegations are dismissed.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor

Relations Board hereby orders that the Respondent, The Coca-Cola Bottling Company of Memphis, Memphis, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively from May 7, 1974, until November 12, 1974, by refusing to recognize the Union as the exclusive bargaining representative of the employees in the bargaining unit and by its refusal to honor the collective-bargaining agreement by not forwarding to it moneys deducted from the wages of employees pursuant to dues-checkoff authorization cards executed by the employees with the Union which is the collective-bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees at the Coca-Cola Bottling Company of Memphis, Tennessee, operation, including driver-salesmen, driver-helpers, helpers, relief drivers, pre-mix, advertising, garage, cooler and fork-lift employees, excluding office clerical employees, guards, professional and technical employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the labor organization named below as the exclusive representative of all employees in the aforesaid appropriate unit with respect to the contract or any other terms and conditions of employment arising between May 7, 1974, and November 12, 1974, the expiration date of the contract.

(b) Pay to the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196, all moneys deducted from the wages of employees pursuant to dues-checkoff authorization cards as required by the collective-bargaining agreement then in effect, between May 7, 1974, and November 12, 1974, together with interest thereon at the rate of 6 percent per annum.

(c) Post at its Memphis, Tennessee, facility copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it

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5 In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. June 30, 1975.

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John H. Fanning, Member

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John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER KENNEDY, dissenting:

In support of their previous ruling granting amendment of certification herein, my colleagues now find the Employer guilty of violating Section 8(a)(5) by refusing to bargain with the Union certified erroneously as a result of that amendment. I dissented at the time my colleagues granted amendment of the certification, the result of which was to force the unit employees to be represented by a union which they had specifically rejected, and I now dissent from their find-

ing a violation of the Act based on the Employer's refusal to bargain with such a union. The result reached by the majority with respect to the alleged "affiliation vote" upon which the amendment of certification was predicated is contrary to the statute.

The affiliation "election" was conducted among only the employees who had signed dues-checkoff cards for Brewery Workers Local 196 or for the Teamsters; other unit employees attempted to vote and were turned away. As a result of this restriction to check off signers, only 81 individuals determined a new bargaining representative for a unit of 490 employees. Thus, more than half of the unit employees were disenfranchised and were excluded from voicing their opposition to the affiliation.[6]

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6 Such a position is contrary to that expressed by Member Jenkins in his joint dissent with Member Zagoria in *North Electric Company*, 165 NLRB 942, 944 (1967):

> It appears basic to the collective-bargaining process that the selection of a bargaining representative be made by the employees in the bargaining unit. In our view, therefore, a cardinal prerequisite to any change in designation of the bargaining representative is *that all employees* in the bargaining unit be afforded the opportunity to participate in such selection.

In *Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Gene Graham Ford, Inc.)*, 188 NLRB 515, 518 (1971), the Board affirmed the Trial Examiner's finding that the petitioning union was *not* a successor to the certified union because "there is no evidence that the wishes of the [unit] employees as to affiliation were separately determined." Again, in approving amendment of certification in *Equipment Manufacturing, Inc.*, 174 NLRB 419, 420 (1969), the Board relied on the fact that "employees constituting not only a majority of union members *but also a majority of employees in the established bargaining unit* have voted . . . for affiliation with the [union]." (Emphasis supplied.) And in granting such amendment in *Safeway Steel Scaffolds Company of Georgia*, 173 NLRB 311 (1968), the Board noted that the *unit* employees, in a separate election, had voted unanimously to transfer certification and bargaining rights.

I am unable to reconcile the result reached by the majority herein with the avowed purpose of the Act we seek to effectuate — the protection of the rights of employees to organize and select their own bargaining representatives. I am puzzled by my colleagues' failure to require approval by a majority of the employees in the unit before authorizing the transfer of the bargaining rights to a different agent.[7]

Manifestly, the majority now recognizes that their earlier amendment of certification places them in an untenable position in this proceeding. Finding that the Respondent violated Section 8(a)(5) and (1) of the Act, my colleagues state:

> However, *in view of the fact that only 81 employees in a unit of approximately 450 voted to approve affiliation* with the Teamsters Union, and that subsequent to such election some 330 employees allegedly disclaimed any desire to be represented by the Teamsters Union, we have concluded that *a question of representation has been properly raised and that,* despite our finding of a refusal to bargain during the term of the con-

7 While the amendment of certification procedure may sometimes function more quickly than Board election procedures, expediency can *never* justify abandonment of due-process requirements. *Martin Marietta Aluminum, Inc.*, 214 NLRB No. 83 (1974). (I note that the motion for summary judgment in this case was filed on August 30, 1974. The petition for amendment of certification was filed in March 1974.)

> tract which has expired and in order to effectuate the policies of the Act, the employees in the bargaining unit should not be foreclosed from an opportunity to accept or reject continued representation by the Teamsters Union through the orderly processes of a secret ballot election. [Emphasis supplied][8]

I fail to see how my colleagues find that the factors present at the time they granted the amendment of certification did not raise a question concerning representation at that time, but that these *same factors* now establish that "a question of representation has been properly raised."

There is absolutely no showing that a majority of the unit employees has consented to the merger at *any* time. Indeed, the record evidence establishes quite the contrary, revealing that 339 of those 490 unit employees signed a petition specifically rejecting the Teamsters Local as their bargaining representative. We cannot find affirmative evidence to justify the merger. We are obliged to accept the employees' expression of opposition to the merger.

Moreover, the "election" itself, held *after* the decision to merge had been announced to the union

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8 The limitation of the bargaining order to the life of the contract, which expired November 12, 1974, is tantamount to an admission that the amendment of certification was erroneous and, hence, that the Respondent's refusal to bargain based on that amended certification was a technical violation.

members and *after* the charter of the new Teamsters Local was issued, cannot validate *nunc pro tunc* such prior decision and action.[9] While my colleagues accept the Respondent's motion to consider previously unavailable evidence and the accompanying attachments, they ignore the evidence submitted in support of that motion. Clearly, the minutes of the Union (specifically the minutes of meetings held October 3, 1973, and January 16, February 6, and March 3, 1974) establish that the decision to merge had been made and announced to the membership prior to the "vote" on the affiliation. Hence, even if the Union had allowed all unit employees the opportunity to vote, which it did not, such belated "election" could not have served to validate the earlier invalid merger.[10]

Since the affiliation with the Teamsters Local was not approved by a majority of the employees in the

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9 *Carriage Oldsmobile Cadillac, Inc.*, 210 NLRB No. 98 (1974). In that case Members Fanning and Jenkins held that "the steps taken by [the International and two local unions] to obtain the approval of unit employees to change their representation . . . — *after informing them that the decision to transfer jurisdiction over them had already been made* — [did not] meet the requirement of participation by unit employees in the decision to change their representative . . . ."

10 I note the Union's refusal to comply with Respondent's *subpoena duces tecum* and produce these minutes at the hearing on amendment of certification. As a result, the Respondent and this Board were denied access to this evidence until after the Union complied with an order of the United States District Court. In my view, such disregard for the proceedings of this Board should not pass without the expressed disapproval of the Board.

unit, I would find that Teamsters Local 1196 is not the authorized bargaining representative of the previously certified unit of employees. Accordingly, the amendment of certification should be rescinded, the complaint herein should be dismissed, the RD petition should be reinstated, and an election should be directed. Such an election would enable the unit employees to express their true desires concerning their bargaining representative.

Dated, Washington, D.C. June 30, 1975

Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

By refusing to recognize and bargain collectively with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196, as the exclusive representative of all the employees in the bargaining unit described below from May 7, 1974, until November 12, 1974, and,

during such time, refusing to honor the terms of the collective-bargaining agreement by refusing to forward moneys deducted as dues from employees' wages pursuant to checkoff authorization cards by said employees, the Board has found that we engaged in unfair labor practices within the meaning of the National Labor Relations Act.

WE WILL pay to the above-named Union all moneys we have deducted from employees' wages pursuant to dues-checkoff authorization cards from said employees from May 7, 1974, to November 12, 1974, together with interest at the rate of 6 percent per annum thereon, as we were required to do under the terms of our collective-bargaining agreement with the above-named Union.

The bargaining unit is:

> All production and maintenance employees at the Coca-Cola Bottling Company of Memphis, Tennessee, operation, including driver-salesmen, driver-helpers, helpers, relief drivers, pre-mix, advertising, garage, cooler and fork-lift employees, excluding office clerical employees, guards, professional and technical employees and supervisors as defined in the Act.

WE WILL, upon request, bargain with the above-named labor organization as the exclusive represen-

tative of all employees in the aforesaid appropriate unit with respect to the contract or any other terms and conditions of employment arising between May 7, 1974, and November 12, 1974, the expiration date of the contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

THE COCA-COLA BOTTLING
COMPANY OF MEMPHIS
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Clifford Davis Federal Building, Room 746, 167 North Main Street, Memphis, Tennessee 38103, Telephone 901-534-3161.

CASE NO. 75-2172

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 75-2172

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,
LOCAL UNION NO. 1196,
Plaintiff-Appellee,

versus

COCA-COLA BOTTLING COMPANY
OF MEMPHIS,
Defendant-Appellant.

Filed: Feb. 22, 1980

ORDER

BEFORE: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and PHILLIPS, Senior Circuit Judge.

In this action brought under Section 301 of the Taft-Hartley Act, the district court directed the defendant-appellant, Coca-Cola Bottling Company of Memphis, to submit two disputes with the plaintiff-appellee,

Teamsters Local No. 1196, to arbitration. The order of the district court was based upon its finding that Teamsters Local No. 1196 is a continuation of the Union with which Coca-Cola had previously executed a collective bargaining agreement.

Upon consideration of the record on appeal together with the briefs and oral arguments of counsel, and in light of this court's order in *National Labor Relations Board v. Coca-Cola Bottling Company of Memphis*, No. 78-1104, decided this date, it is ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

_____

Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE, WESTERN DIVISION

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN,
AND HELPERS OF AMERICA,
LOCAL UNION NO. 1196,
Plaintiff,

versus CA No. C-74-418

COCA-COLA BOTTLING COMPANY
OF MEMPHIS,
Defendant.

Filed: January 24, 1975

ORDER COMPELLING ARBITRATION

This action arose under §301 of the Labor-Management Relations Act, as amended, 29 U.S.C. §185.

On January 6, 1975, in an order on motion to dismiss, the Court ordered an evidentiary hearing on the issue of whether the plaintiff is a continuation of the old union or a new union.

The cause came on to be heard on January 17th, 1975 before the Honorable Robert M. McRae, United States

District Judge, upon testimony of witnesses for the plaintiff and defendant, argument of counsel, and the record of the cause; it is found that plaintiff, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196 is a continuation of the old union and not a new union, therefore, the Court orders defendant Coca-Cola Bottling Company of Memphis to arbitrate with the plaintiff the dispute over Coke Day and the refusal to tender dues to plaintiff.

It is so ordered this 24th day of January, 1975.

/s/ Robert M. McRae, Jr.
United States District Judge

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Number and Title Omitted)

BE IT REMEMBERED That the above-styled cause came on to be heard and was heard on January 17, 1975, before the Honorable Robert M. McRae, Judge, upon a Motion to Dismiss filed by the Defendant, when and where evidence was introduced and proceedings were had, as follows:

THE COURT: All right, the Court will make an oral ruling and counsel can make notes.

If there is going to be an appeal of the Court's ruling we will have to have written findings and we will see how that will go.

Well, let me back up for just a minute.

Under Section 301, or under the laws that Congress has passed, this Court is given jurisdiction wherein a labor organization may sue an employer to enforce a collective bargaining agreement.

Now, the only reason that the Court has got into this question and set this hearing in this case that the Court knows of is that the defendant employer has chal-

lenged the right of this plaintiff to be the one who the law says you get to choose under the collective bargaining agreement. It is a rather novel question and it brings in some matters that haven't been completely resolved.

As the Court indicated in its ruling on the Motion to Dismiss, which incidentally set the hearing, the question boils down to whether this is a continuation of the former local union, or is a new union which would require a new process.

Now, this Court takes the position that great weight must be given to the National Labor Relations Board finding, and that this Court is not established to supervise elections.

The significant findings of fact that the Court establishes, some of them are undisputed.

First, there was a merger of the two International unions into the Teamsters Union. Of the number of employers in the Memphis area who had been dealing with the former Local 196 all of the others recognized this as a continuation. Now, I think that is a fact from which the Court may draw an inference.

The new Local 1196 for the period of transition operated under the old bylaws. They ultimately transferred the assets in the form of a bank account. They stayed in the same location. It is true that some of the

officers and the bylaws were ultimately changed to conform, but particularly they held an election in a method that the National Labor Relations Board has approved.

The members saw fit to elect two affiliate, or to have the local union become an affiliate of the new merged Teamsters Union.

The employer has injected itself into an area that it is not an appropriate arbitrator. It is going to bring on trouble as it has in this case if the Coca-Cola Bottling Company takes it upon itself to be the guardian of the rights of its employees that's where the trouble began.

Apparently in January when Mr. Maxwell went out there the company relied upon some technicality and said they had not been officially notified of the change-over.

Proof is on its way that a representative of the company did receive the notice, and whether it went to the wrong man I don't know.

Furthermore, there are exhibits in here where even after the election officials of the Coca-Cola Bottling Company continued to put up notices that were inflamming the dispute that should have been resolved between the employees, and which had been resolved in an election.

The Court believes that the Coca-Cola Bottling Company is modified by the fact it wants to choose the union for the employees instead of letting the established person do so.

Therefore, the Court finds it must reject the defense of the Coca-Cola Bottling Company and must find this is a continuance, and must order arbitration. Therefore, the Court does order arbitration.

I might say one other finding that — well, no, I won't put that finding in there.

The Court does direct arbitration and, of course, the arbitrator, some of these defenses can be raised whether or not this day called Coke Day is involved.

One other finding, I think it ill becomes the Coca-Cola Bottling Company to establish their own representatives that is former stewards, and to find that they have complied with the Labor Laws by saying we called two people in and saying if you had any grievances you go present them. If we let employers do that the first thing you know we wouldn't have any laws, they would say we picked these people, we don't like the ones the employees picked in an election.

I think Coca-Cola Bottling Company has just gotten into an area that it is none of their business. They may feel some moral obligation to keep employees' dues down, and some may have come to management, but

they should tell them to handle that like other organizations are.

Let me make one other observation, labor unions are a different kind of organization, they are really the backbone of America in a lot of ways. The members are not polished people that are always trained in Robert's Rules of Order, and who have been to the several extra grades of schooling. But these people, this is their life blood, and for the employer to be critical because the minutes weren't written exactly right, or because somebody said something that sounded a little harsh, that's none of the employer's business. They don't get to go to the labor union's meetings, and they ought to keep out of that, whether it be directly or indirectly.

These labor union meetings, they are never fully attended, there is always a corps of interested people that carries on for the others.

An employee should abide by what goes on at these meetings, and let the employee — the petition go to the unions and that is where it will be heard.

The Court would expect Mr. Agee to prepare an appropriate order and submit to Mr. Brackhahn, and then to the Court, and you can do that by letter or bring it over one morning next week.

You may adjourn court.

(ADJOURNMENT)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE, WESTERN DIVISION

(Number and Title Omitted)

Filed: January 7, 1975

ORDER ON MOTION TO DISMISS

This action arises under §301 of the Labor-Management Relations Act, as amended, 29 U.S.C. §185 (hereafter referred to as "the Act" Plaintiff alleges that effective November 12, 1971, the Plaintiff and Defendant entered into a collective bargaining agreement and that without justification, the Defendant has failed and refused to process grievances in accordance with Article V of that labor agreement between the parties in regard to the denial of a holiday under Article VII of the contract, specifically the denial of Coke Day Holiday and has failed and refused to tender to the collective bargaining representative those dues checked off in accordance with Paragraph III of the collective bargaining agreement. Plaintiff further alleges that Defendant has rebuffed any attempts by the Plaintiff to arbitrate the denial of the holiday and dues checkoff. Plaintiff requests that the Court either compel the Defendant to pay employees in accordance with the contract for the denial of the holiday and to collect and tender the dues of the collective bargaining agreement, or compel the Defendant to proceed to arbitrate such issues.

Defendant's Motion to Dismiss is now before this Court relying on the contention that this Court lacks jurisdiction over the subject matter and also lacks jurisdiction over the party of the Defendant because the Plaintiff lacks the requisite standing to bring this §301 action. An explanation of the background of the relationship between these two parties is necessary to understand the Motion to Dismiss and the Court's response to that Motion. On June 12, 1968 in Case No. 26-RM-238, Local 196 of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers was chosen as Defendant's Employees' Representative for purposes of collective bargaining. The International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 196 then entered into a collective bargaining agreement with Defendant, the Coca-Cola Bottling Company of Memphis, Tennessee. Subsequent to this collective bargaining agreement, it is undisputed that there was a merger of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America and that after this merger the Regional Director of the Twenty-Sixth Regional Office of the National Labor Relations Board amended the certification of Defendant's employees' representative by substituting the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196 for the International Union of United Brewery,

Flour, Cereal, Soft Drink and Distillery, Local Union 196, the original party to the collective bargaining agreement. It is further undisputed that the Decision of the Twenty-Sixth Regional Office amending certification naming the Plaintiff as Defendant's employees' representative for collective bargaining purposes was affirmed by the National Labor Relations Board by means of a denial of Defendant's request for review. It is also undisputed that on July 22, 1974, Plaintiff filed a charge with the National Labor Relations Board alleging that Defendant has engaged in unfair labor practices. Defendant in its response to the charge has challenged the certification of Plaintiff as Defendant employees' representative for collective bargaining purposes.

The Defendant in its Memorandum of Law and Points of Authority in Support of Defendant's Motion to Dismiss and in its Supplemental Memorandum submits that Plaintiff does not have standing to bring this §301 action to enforce certain provisions of the collective bargaining agreement because it was not a party to the original collective bargaining agreement it seeks to enforce. Defendant further asserts that this Court lacks subject matter jurisdiction to hear this §301 action because there has been no final determination as to Plaintiff's status as the representative of Defendant's employees by the National Labor Relations Board which has exclusive jurisdiction over representation questions and until such a determination, this Court

lacks the power to recognize the Plaintiff and hear the suit. Defendant argues that although a certification decision has been made by the Twenty-Sixth Regional Office of the National Labor Relations Board and affirmed by the National Labor Relations Board certifying the Plaintiff as Defendant's employees' representative, this decision is merely interlocutory in light of the fact that the decision is not reviewable by the Court of Appeals pursuant to §10(e) and (f) of the Act. Therefore, Defendant concludes this Court must stay any action until the National Labor Relations Board makes a determination in the pending unfair labor practice proceeding in which Defendant asserts as a defense that Plaintiff is not a proper representative and not properly certified because only then will there be a final order under §§10(e) and (f) which is reviewable by the Court of Appeals as to whether Plaintiff is the proper representative of Defendant's employees.

Looking first to the question of whether this Court has jurisdiction to hear this §301 action at this time, the Court must face the issue of whether a Court is required to await a decision of the National Labor Relations Board when the question of proper representation has been raised as a defense in an unfair labor practice proceeding before it proceeds in a §301 action pending before it. A determination of this issue revolves around the treatment that must be accorded to a Regional Director's certifications findings which are affirmed by the National Labor Relations Board and to

the problem of the concurrent jurisdiction of the Courts of the National Labor Relations Board. The Regional Director's decision as to certification of a union pursuant to 29 U.S.C. §153, which authorizes the Board to delegate its powers to its regional directors under 29 U.S.C. §159, must be presumed valid and final until it is later overturned by the Board or the Court of Appeals. This presumption of finality of the Regional Director's decision is grounded both in case precedent and policy considerations which form the basis of the National Labor Relations Act. While the Regional Director's Certification Order is not a "final order" in reference to whether it may be appealed pursuant to the unfair labor practice provisions of 29 U.S.C. §160, it should be given deference by this Court until reversed. Courts uniformly have found that an employer must honor certification by the Regional Director and the Board until such certification is rescinded or a contrary order is issued. *N.L.R.B.* v. *Warrensburg Board and Paper Corp.*, 340 F.2d 920 (C.A. N.Y., 1965); *N.L.R.B.* v. *Sanson Hosiery Mills*, 195 F.2d 350 (C.A. 5, 1952); *N.L.R.B.* v. *May Dept. Stores Co.*, 146 F.2d 66 (C.C.A. 8, 1945) modified on other grounds, 66 S.Ct. 203, 90 L.Ed. 145, rehearing denied, 66 S.Ct. 468, 326 U.S. 811. As stated in *National Labor Relations Board* v. *Sanson Hosiery*, 195 F.2d 350, 352 (C.A. 5, 1952),

> "Although certification of a bargaining representative by the Board is not intended to create a permanent relationship without re-

> gard to new situations that may develop, there must be a reasonable measure of stability to the relationship so established, as it is one of the objectives of the Act to stabilize as well as improve industrial relations. Such a certification when lawfully made, must be respected by the employer until changed conditions are reflected by a later ruling by the Board altering or setting aside the certification."

This Court finds no rationale for requiring an employer to treat the certification decision of a Regional Director as final for recognition purposes without requiring the same treatment by the courts. This Court therefore holds that it has the requisite jurisdiction to decide this §301 action and is not required to await the decision of the National Labor Relations Board in the unfair labor practice proceeding.

Policy reasons as well dictate that this Court proceed with the §301 action and not await the decision of the National Labor Relations Board. Refusal to give the Regional Director's certification decisions binding effect would leave the certified union in the precarious position of being unable to enforce the contract rights of the employees it represents between the time of certification and the decision by the National Labor Relations Board in the unfair labor practice proceeding. The employees would thus be left for that period without a representative to enforce and protect their rights

pursuant to the collective bargaining agreement. Such rights would be protected at the whim or will of the employer. This state of affairs is inimical to the policy of the Act, to promote stability and industrial peace. In a §301 action in which the Fifth Circuit ordered the parties to arbitrate in the face of a pending petition before the Board for decertification of the union representing the employees involved in the §301 action, the Court weighed the conflicting factors of protecting the employees' contract rights by compelling arbitration against the statutory duty to deal only with a majority representative and stated in ordering arbitration,

> "To leave the individual worker to his own devices and resources in the name of legislation designed to equalize positions is to ignore the rich history of labor-management relations and to frustrate a primary aim of such legislation." *United States Gypsum Co.* v. *United Steelworkers of America*, 384 F.2d 38, 45 (C.A. 5, 1967)

While this Court recognizes that some inconsistency may develop from this Court deciding this §301 action before the National Labor Relations Board makes its determination in the unfair labor practice proceeding, it has been suggested that some inconsistency is the price to be paid to ensure prompt and efficient enforcement of contract rights. See Sovern, *Section 301 and the Primary Jurisdiction of the N.L.R.B.*, 76 Harv. L. Rev. 529, 570-572 (1963)

While this Court finds that it has the requisite jurisdiction to hear this §301 action at this time, it is unable to determine from the submitted pleadings and motions whether the Plaintiff is the proper party to bring such an action. In light of the fact that the Plaintiff was not a signator to the original bargaining agreement it seeks to enforce, it must be determined by this Court whether the Plaintiff is a continuation of the old union which was a party to the collective bargaining agreement in question or whether the Plaintiff is a new union. This Court therefore orders that an evidentiary hearing be held on the issue of whether Plaintiff is a continuation of the old union or a new union on Friday, January 17, 1975. Once this issue has been decided by the Court, the Court will be free to compel the parties to arbitrate or dismiss the action.

It is so ORDERED, ADJUDGED AND DECREED.
This the 6th day of January, 1975

/s/ Robert M. McRae, Jr.
United States District Judge

Supreme Court, U.S.
FILED
OCT 9 1980
MICHAEL RODAK, JR., CLERK

No. 79-1834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

COCA-COLA BOTTLING COMPANY OF MEMPHIS, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, LOCAL UNION NO. 1196, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION 1196, IN OPPOSITION

LYNN AGEE
HICKS, GILLESPIE, JAMES & AGEE, P.C.
3121, 100 North Main Building
Memphis, Tennessee 38103
(901) 523-0019

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. The questions presented are properly set forth on page 1 of the Brief for the National Labor Relations Board in Opposition.

2. Petitioner failed, as required by Rule 23 of this Court, to raise any question pertaining to the Court of Appeals decision in Case No. 75-2172, affirming a decision of the United States District Court compelling arbitration.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1834

COCA-COLA BOTTLING COMPANY OF MEMPHIS, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, LOCAL UNION NO. 1196, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION 1196, IN OPPOSITION

OPINIONS BELOW

The opinions are correctly set forth by consolidating page 1 of the Petition and page 1 of the Brief for the National Labor Relations Board in Opposition.

STATEMENT

In September of 1973 the International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, (herein "Brewery Workers"), and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (herein "Teamsters"), entered into a merger/affiliation agreement.

A chronology of labor union merger activity in the United States reflects that from 1956 through August of 1978 there was a total of 73 mergers involving national labor organizations. Between May of 1971 to August of 1978, 8,112,735 union members had their unions participate in mergers. The merger in question here involved 50,198 Brewery Workers merging with 1,854,659 Teamsters. Janus, *Union Mergers in the 70's: A Look at the Reasons and Results,* Monthly Lab.Rev., Oct., 1978, at 13; Dewey, *Union Merger Pace Quickens,* Monthly Lab.Rev., Jun., 1971, at 63.

Prior to the convention of the Brewery Workers approving the merger/affiliation, the membership of Brewery Workers, Local 196, authorized its business agent to attend the convention and vote "Yes" on the merger (NLRB App. 3a). The merger was approved by the Brewery Workers. On November 16, 1973, Local 196 was issued a new charter as Local 1196 (NLRB App. 4a). The union sent notice to the eight employers with whom it had collective bargaining agreements. *Petitioner, Coca-Cola, was the sole employer who declined to recognize the newly chartered local.* [emphasis added] Petitioner denied receiving notice of the changeover, although the United States Post Office return receipt reflected it received the notice. United States District Court Judge McRae found the notice had been received (Pet. App. 178a).

The Union, faced with the refusal by Coca-Cola to recognize the merger, scheduled an affiliation vote and on or

about February 19, 1974, the union posted notices in several locations, time clocks and bulletin boards near work stations utilized for posting information at the employer's plant (NLRB App. 5a). The notice was addressed to "All Union Members Employed at Coca-Cola" and stated that a union meeting would be held at 2:00 P.M. on Sunday, March 3, 1974 at Teamsters 984 Union Hall. The purpose was stated as:

> Affiliation Vote: The purpose of this meeting is for all union members at Coca-Cola to consider and discuss the question of affiliation of Local Union 196 with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and to vote in the secret ballot election of the affiliation.

Petitioner illegally removed these notices from the bulletin board, but the union continued to post its notices, and in an effort to notify all employees, handbilled notices to approximately 150 of the employees at Coca-Cola (Pet. App. 152a; NLRB App. 6a). Petitioner, while removing the notices of the union that an affiliation vote was taking place, unlawfully sponsored and circulated a petition attempting to get employees to reject the Teamsters, threatened employees with loss of benefits if they supported the Teamsters, and attempted to get employees to not attend the meetings where the union was discussing and voting on affiliation (Pet. App. 126a).

The eligibility for the March 3, 1974 affiliation election was comprised of anyone who had either signed a Brewery Workers card or a Teamsters card; therefore any of Petitioner's employees who wanted could vote in the election by signing a card (NLRB App. 7a).

A secret ballot election was conducted with the use of a ballot which stated:

> To affiliate with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.
>
> "Yes" "No"

A voter eligibility list was utilized; only one person at a time was allowed in the secret booth; the ballots were dropped in secured ballot boxes; union members were selected for the tabulation of ballots, and the results of the election were 78 for affiliation; three against; one void (NLRB App. 8a).

Petitioner incorrectly states that in September of 1974 approximately 330 employees signed in support of a petition to decertify Teamsters, Local 1196. The Regional Director rejected that petition, the Cox petition, since Cox had failed to secure at least 30% of the employees in the appropriate collective bargaining unit (Pet. App. 123a). The Krone petition of January-February, 1974 was rejected by the Board because the company had unlawfully assisted Krone in his effort to acquire signatures on the petition and for having illegally encouraged its employees to sign the petition (Pet. App. 122a).

The employees of Petitioner were not denied participation and a voice in the affiliation; the only plebiscite denial was by the illegal coercion that occurred by Petitioner in attempting to interfere with the employees' internal union affairs.

REASONS FOR DENYING WRIT

1. The NLRB and the District Court Applied an Historically Consistent Policy as to Union Mergers and Affiliations.

The Board has consistently held that subsequent ratification of a merger by bargaining unit employees satisfies procedural requirements. *Ocean Systems, Inc.*, 223 NLRB 857 (1976); *Kentucky Power Co.*, 213 NLRB 730 (1974); *Safeway Steel Scaffolds Co.*, 173 NLRB 311 (1968).

An amendment to certification may be filed by a local union to reflect the merger of its international affiliate with another affiliate. See, e.g., *N.L.R.B. v. Pearl Book Binding Co.*, 517 F.2d 1108 (1st Cir. 1975); *N.L.R.B. v. Commercial*

Letter, Inc., 496 F.2d 35 (8th Cir. 1974); *Carpenteria Lemon Assn. v. N.L.R.B.*, 240 F.2d 554 (9th Cir. 1956), *cert. denied*, 354 U.S. 909 (1957); *Dickey v. N.L.R.B.*, 217 F.2d 652 (6th Cir. 1954).

The District court, in ordering arbitration, correctly applied federal labor policy favoring arbitration. *United States Gypsum Co. v. United Steelworkers of America*, 384 F.2d 38 (5th Cir. 1957), *cert. denied*, 389 U.S. 1042 (1968); 492 F.2d 713 (5th Cir. 1974). In *United States Gypsum, supra*, the Court ordered an employer to arbitrate with the union regardless of proceedings before the Board on the question of the union's standing as representative.

Petitioner misunderstands the Board's policy; there is no conflict in Board decisions. The Board has consistently amended certifications in union merger situations for many years. *East Ohio Gas*, 140 NLRB 1269 (1963); *North Electric Co.*, 165 NLRB 942 (1967); *Equipment Manufacturing Co.*, 174 NLRB 419 (1969); *East Dayton Tool & Die*, 199 NLRB No. 115 (1971); *Hamilton Tool*, 190 NLRB 571 (1971); *Standard Brands*, 214 NLRB 72 (1973).

Petitioner cannot rely on *Jasper Seating*, 231 NLRB 1025 (1977); the Board briefly concluded that in a merger of an *independent* with an international, employees who are not members of the union should be permitted to vote in the internal union vote [emphasis added]. That was the first and only Board decision where it had taken such a radical approach to internal union elections as to allow nonmembers to vote. The Board considered the question of nonmembers voting in *Amoco Production Co.*, 239 NLRB No. 182, decided on the same day as the decision herein. *Jasper Seating* was reversed to the extent that it was not consistent with *Amoco*. In any event, in the three decisions involving Coca-Cola's there was no confusion among the Board members as to whether or not, in the present factual situation, a bargaining order is warranted. While Board Members Jenkins and Penello dissented in *Amoco*, Jenkins

because nonmembers did not vote, and Penello because of an "impact of change"; both voted to affirm the bargaining order in *Coca-Cola.* Member Penello, contrary to the claims of Petitioner's brief, in his dissent in *Amoco,* concluded that the facts in *Amoco* created an "impact of change" which warranted a Board supervised election in an independent merger with an international. This Court should note that in the instant decision, Penello, in the Board's decision at 218 NLRB No. 179, voted to affirm the finding of an 8(a)(5) violation; therefore indicating he did not feel there was an "impact of change" that warranted a Board conducted election. Furthermore, Member Jenkins, who in *Amoco* indicated he would allow nonmembers to vote, voted to affirm the 8(a)(5) finding in the instant case, reported at 232 NLRB No. 125. Accordingly, there was uninanimity of all members of the National Labor Relations Board that the merger and affiliation were proper, that there was continuity of the union, and a bargaining order was warranted.

Petitioner is asking this Court to require the National Labor Relations Board to conduct a Board supervised election each time there is an affiliation or merger of unions. This would be a radical change from years of practice by the National Labor Relations Board and would place an impossible burden on an already overworked NLRB.

2. There is no Conflict of Circuits

The Sixth Circuit merger decisions, including the instant case, are not in conflict with the Third Circuit or any other circuit. The Sixth Circuit has often considered the question of NLRB bargaining orders following union mergers. *Dickey v. N.L.R.B.,* 217 F.2d 642 (1954); *Union Carbide v. N.L.R.B.,* 244 F.2d 672 (1957); *N.L.R.B. v. Canton Sign,* 457 F.2d 832 (1972); *Tanner Co. v. N.L.R.B.,* 517 F.2d 982 (1975). In *Dickey, Canton Sign* and *Tanner, supra,* the Sixth Circuit denied bargaining orders. In *Union Car-*

bide, supra, and the instant care, the Sixth Circuit enforced bargaining orders. The court made factual evaluations whether there was due process of the voting procedure and/or whether there was continuity of the union.

The Petitioner relies on *American Bridge Division, U. S. Steel Corp. v. N.L.R.B.,* 457 F.2d 660 (3rd Cir. 1972), and *N.L.R.B. v. Bernard Gloekler Northeast Co.,* 540 F.2d 197 (3rd Cir. 1976). These cases are distinguishable and turn on their own facts. Cf, *St. Vincent Hospital v. N.L.R.B.,* 621 F.2d 1054, (10th Cir., May 1980).

In *Bernard Gloekler, supra,* members of an independent local voted to affiliate with the pre-existing UAW local. However, the court refused to honor the affiliation because the UAW had recently failed to oust the independent in NLRB representation proceeding and was attempting to circumvent NLRB contract bar rules. In *American Bridge, supra,* there was no secret ballot, no eligibility list, no time for debate. Here, there was no effort to circumvent NLRB procedure and the procedural due process was as exacting as that of any election; (except for Petitioner's efforts to sabotage the proceedings), due notice, secret ballot, eligibility list, open debate, ballot voting, securing of ballots, tally by members, and recording of a vote overwhelmingly in favor of affiliation by the membership.

In the instant case the Board, on its factual examination, approved by the Sixth Circuit, concluded "[T]hat Teamsters, Local 1196 was a continuation of Brewery Workers, Local 196, and there was no justification for Coca-Cola's withdrawal of recognition". United States District Judge McRae, on a factual examination of the question of whether Local 1196 was a continuation of Local 196, answered in the affirmative. Accordingly, the Sixth Circuit and the Third Circuit are applying the same test; whether or not continuity of representation continues. The employer is erroneously attempting to get the Supreme Court to do a

factual analysis. The decisions below of the Board and the District Court turn on their own facts applying an historically consistancy test.

3. There is no Conflict with the Decisions of this Court

This Court, in *Carpinteria Lemon Assoc. v. N.L.R.B.*, 240 F.2d 554, 557 (9th Cir. 1956), denied certiorari at 254 U.S. 909 (1957). The Ninth Circuit, in *Carpinteria, supra,* had applied the test:

> Right of a successor union to assume the status of certified bargaining agent held by its predecessor depends on a factual issue—is the new union a continuation of the old union under a new name or affiliation, or is it a substantially new and different organization?

The Court's decision in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969) cannot be read as a merger or affiliation case which would warrant the Board to conduct elections in each of these situations. *Gissel, supra,* considered under what conditions an NLRB bargaining order is warranted when an employer's unfair labor practices are at certain levels and the extent to which that bargaining order should last.

Petitioner's exuberance in attempting to apply *Gissel* led it to make several inaccurate statements of fact. On page 17 of its Brief, the petitioner states:

> Assuming the premise underlying the Board's decision that there was no change in the bargaining representative, the relationship had been given a reasonable period in which to succeed. Indeed, it had borne fruition in two collective bargaining contracts.

According to the United States District Court and the Board, the employer unilaterally terminated the bargaining relationship in November of 1973 and has continued its refusal to bargain until the present. There was no period

whatsoever for the bargaining relationship to succeed.

Petitioner also more blatantly claims on the same page:

> Indeed, no bargaining had been postponed as a result of the company's action at the time the petition was filed.

The record reflects that the Petitioner would not allow the union's representatives on company property, tore down union notices of meetings, and had established their own agents to persuade employees to not support the union. Bargaining had not only been postponed, but unilaterally cancelled by the Petitioner, including cessation of paying dues to the union. Petitioner failed to recognize holidays that were granted under the collective bargaining agreement or arbitrate grievances arising out of violations of the contract. In spite of those flagrant acts at circumventing the bargaining process and the collective bargaining agreement, Petitioner continued its inaccurate claims in its brief by stating:

> There was no contention of violations of the collective bargaining agreement in effect then except the transfer of holiday and the company's refusal to remit to Teamsters, Local 1196, those dues authorized for checkoff to Local 196.

Petitioner terminated its relationship with the union. No bargaining or contract enforcement could take place. Petitioner grasps and mistakes facts created by its own illegal acts. The presence here of the unchallenged findings and meritorious argument that Petitioner's own illegal conduct in interfering with the union's affiliation vote makes the decisions below right. Petitioner should not be the benefactor of its own misdeeds.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 9th day of October, 1980.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

COCA-COLA BOTTLING COMPANY OF MEMPHIS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 1196

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OCTOBER TERM, 1979

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COCA-COLA BOTTLING COMPANY OF MEMPHIS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 1196

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Board properly found that, in the circumstances of this case, petitioner was not relieved of its obligation to bargain with the employees' bargaining agent because it affiliated with a different international union.

2. Whether the Board properly found that the filing of a decertification petition did not justify petitioner's withdrawal of recognition from the bargaining agent.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 4a–6a) is reported at 616 F.2d 949. The Board's original decision and order (Pet. App. 14a–144a) is reported at 232 N.L.R.B. 794. Its supplemental decision and order (Pet. App. 7a–13a) is reported at 239 N.L.R.B. No. 183. The decision of the acting regional director on behalf of the Board amending the union's certification is unreported (App., *infra*, 1a–10a).

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1980 (Pet. App. 4a–6a). A petition for rehearing or rehearing en banc was denied on April 3, 1980 (Pet. App. 3a). The petition for a writ of certiorari was filed on May 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at pages 3 and 4 of the petition.

STATEMENT

In June 1968, the Board certified the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Brewery Workers) as the bargaining representative of petitioner's (the Company) employees (Pet. App. 9a, 28a). In November 1971, the Brewery Workers and its Local Union No. 196 signed a bargaining agreement with the Company effective until November 12, 1974 (Pet. App. 9a, 108a).

In December 1973, the Brewery Workers and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters) agreed to merge (Pet. App. 9a, 27a–28a). Pursuant to the merger, Local 196 was rechartered as Teamsters Local 1196 (Pet. App. 9a, 28a).

Thereafter, Local 1196 conducted meetings of the union membership in January and early February 1974, to discuss the effects of the merger. On March 3, 1974, a special meeting of the membership was called to vote on affiliation with the Teamsters and a secret ballot election was held (Pet. App. 10a–11a). Affiliation with the Teamsters was approved by a vote of 78 to 3, with one void ballot (Pet. App. 11a).[1]

After the merger and rechartering, Local 1196 continued to operate with essentially the same officers as Local 196 (App., *infra*, 4a). Local 1196 also continued to operate under the same by-laws and constitution as had Brewery Workers Local 196 (A. 75, 75a, 98)[2] and to operate out of the same office, using the same books and records and bank accounts (App., *infra*, 4a–5a). Moreover, Local 1196 continued to abide by and enforce Local 196's bargaining agreements, and all the employers which had recognized Local 196, with the exception of the Company, continued to recognize,

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[1] Unit employees who had signed dues-checkoff or authorization cards for either Local 196 or the Teamsters were eligible to vote. At the time of the election, there were approximately 490 employees, of whom 212 were on the eligibility list (Pet. App. 10a–11a & n.3).

[2] "A." refers to the printed appendix to the briefs in the court of appeals.

forward union dues to, and process grievances with, Local 1196 (App., *infra*, 4a).

Pursuant to a petition filed by Local 1196, the Board amended the certification designating the bargaining agent for the company's employees to reflect the agent's affiliation with the Teamsters (App., *infra*, 10a; Pet. App. 104a-105a). In the subsequent unfair labor practice proceedings, the Board found that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with Local 1196, and issued a bargaining order (Pet. App. 12a, 124a-125a, 133a).[3]

In concluding that the Company unlawfully refused to bargain with Local 1196, the Board rejected the contention that the affiliation election was improperly limited to union members. The Board explained that "an affiliation vote is basically an internal union matter," and noted that "nonmembers were not foreclosed from an opportunity to become members and to then participate in the election" (Pet. App. 11a).

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[3]The Board further found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by seeking to undermine Local 1196 by sponsoring the circulation of antiunion petitions, and by inducing and threatening employees to withdraw from the Local. The Board also found that, in furtherance of this antiunion campaign, the Company discharged Magnolia Jackson, the leading supporter of the union, and, when the employees engaged in an unfair labor practice strike protesting the Company's illegal conduct, the Company threatened strikers with discharge, conditioned their reinstatement upon confessions of guilt for striking, and delayed their reinstatement, in violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1) (Pet. App. 126a-127a). The court of appeals upheld these findings except as to the discharge of Jackson (Pet. App. 5a-6a). The Company does not challenge those findings here.

The Board also rejected the Company's contention that it properly relied on an antiunion petition submitted to the Company by employee Randolf Krone on March 4, 1974, and the decertification petition filed with the Board by employee Richard Lee Cox on September 10, 1974, in justifying its withdrawal of recognition from Local 1196 (Pet. App. 105a–106a). The Board held that the Company could not rely on the Krone antiunion petition because the Company unlawfully assisted the Krone effort and encouraged its employees to sign the petition (see note 3, *supra*) (Pet. App. 122a). Regarding the Cox decertification petition, the Board concluded that, since Cox failed to secure support from at least 30% of the employees to decertify Local 1196, the Regional Director properly solicited withdrawal of this petition pursuant to the Board's policy that representation petitions will be processed only if supported by a 30% showing of interest (Pet. App. 123a).[4]

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[4]The Board's Statements of Procedure, Section 101.18, (29 C.F.R.), state in pertinent part:

> The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.

In its initial decision on the Section 8(a)(5) aspect of this proceeding (Pet. App. 149a–171a), the Board (Member Kennedy dissenting) concluded that the Company violated Section 8(a)(5) of the Act by refusing to bargain with Local 1196 during the pendency of the Brewery Workers contract. However, the

The court of appeals enforced the Board's bargaining order, concluding that substantial evidence supported the Board's findings that "Teamsters Local 1196 was a continuation of Brewery Workers Local 196 and there was no justification for Coca-Cola's withdrawing recognition" (Pet. App. 5a).[5]

ARGUMENT

The Board's policy, approved by the courts, is that the merger of two international unions, which leads to the rechartering of a constituent local, does not raise a question of representation to be resolved through the Board's election procedures so long as the identity of the union which was the bargaining representative remains essentially unchanged and the members of the union have been afforded an opportunity to consider and vote on the proposed change through democratic

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Board further found that a question of representation was properly raised by the decertification petition. It therefore limited the Company's bargaining obligation to November 12, 1974, the expiration date of the Brewery Workers contract (Pet. App. 154a–155a, 106a–108a). Thereafter, the Board vacated its initial decision and consolidated the Section 8(a)(5) complaint with the Section 8(a)(1) and (3) complaint (*supra*, note 3) which had subsequently been filed (Pet. App. 145a–148a). The Board noted that "if [those] allegations are proven, [it] would establish that the [Company] unlawfully solicited employees to decertify, and not to support [Local 1196]" (Pet. App. 146a). The Board also noted that the decertification petition had been withdrawn (*ibid.*).

[5]The Company also seeks review of the order of the court of appeals enforcing an order compelling arbitration of two contract disputes with Local 1196 (Pet. 2, 18 n.2; Pet. App. 172a–173a). The petition does not present any question pertaining to that order, as required by Rule 23 of the Rules of this Court. We therefore do not address it.

processes. *NLRB* v. *Pearl Bookbinding Co.*, 517 F.2d 1108, 1111-1112 (1st Cir. 1975); *NLRB* v. *Commercial Letter, Inc.*, 496 F.2d 35, 39-42 (8th Cir. 1974); *Union Carbide & Carbon Corp.* v. *NLRB*, 244 F.2d 672, 673 (6th Cir. 1957).

The Company's contention (Pet. 10) that the change in international affiliation did change the identity of the bargaining agent merely contests the Board's contrary finding, which was upheld by the court of appeals.[6] That factual issue raises no issue warranting review by this Court. *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503 (1951).[7]

Similarly, the courts have upheld the Board's position that a vote on a change of union affiliation may properly be confined to those members of the bargaining unit who are union members. *NLRB* v. *Commercial Letter, Inc.*, *supra*, 496 F.2d at 40; *NLRB* v.

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[6] As noted above (*supra*, pages 2-3; App., *infra*, 4a-5a), the regional director found that Local 1196 has continued to operate with essentially the same officers, using the same minute books and records, the same office, the same bank accounts, and the same by-laws and constitution, as had Local 196.

[7] The decisions of the Third Circuit in *American Bridge Division, U.S. Steel Corp.* v. *NLRB*, 457 F.2d 660 (1972), and *NLRB* v. *Bernard Gloekler North East Co.*, 540 F.2d 197 (1976), relied upon by the Company (Pet. 13-16), are distinguishable. Those cases involve affiliation of a small independent union with a large international union where, on the facts presented, the court concluded that there was no continuity of representative. Nor is *Amoco Production Co.* v. *NLRB*, 613 F.2d 107 (5th Cir. 1980) (Pet. 11-12), to the contrary. There the Fifth Circuit remanded the case to the Board for a factual determination on whether there was continuity of representation. 613 F.2d at 112. And see *Retail Store Employees Union, Local 428* v. *NLRB*, 528 F.2d 1225, 1227 (9th Cir. 1975).

Pearl Bookbinding Co., supra, 517 F.2d at 1111-1112. As the First Circuit stated in *NLRB* v. *Pearl Bookbinding Co., supra*, 517 F.2d at 1111, nonmembers of the union are not entitled to vote in any affiliation election where there is no evidence "to show that the successor union is substantially different—other than in name and affiliation—from the prior union." For, as the Board held in *Hamilton Tool Co.*, 190 N.L.R.B. 571, 574 (1971), where "the subject voted upon involve[s] an internal union matter relating to the affiliation of the incumbent union rather than to the employee selection of a bargaining representative, the preclusion of nonmembers from voting [does] not affect the regularity of the election."[8]

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[8] As the Board explained in *Amoco Production Co.*, 239 N.L.R.B. No. 182 (Jan. 3, 1979), slip op. 2-3, remanded on other grounds, *Amoco Production Co.* v. *NLRB*, 613 F.2d 107 (5th Cir. 1980):

> An affiliation is the alignment or association of a union with a national or parent organization. An affiliation does not create a new organization, nor does it result in the dissolution of an already existing organization. The organizations participating in the affiliation determine whether any administrative or organizational changes are necessary in the affiliation organization. * * *
>
> * * * [A]ffiliation does not directly involve the employment relation. The status of wages, working conditions, benefits, and grievance procedures is unaffected by the affiliation vote; the collective-bargaining agreement between

The second question presented in the petition (Pet. 3)—whether employees are entitled to an election "when an uncoerced majority * * * have signed a petition repudiating their union"—is not raised on this record. As shown above, (see page 4, *supra*), the Krone petition was found by the Board to have been tainted by Company coercion (Pet. App. 34a–47a), and the Cox petition was withdrawn when it appeared that it did not contain a sufficient showing of interest to hold an election under the Board's rules (Pet. App. 110a; *supra*, note 4).

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the union and the employer remains effective until the stated expiration date.

Having no direct effect on the employment relationship, affiliation vote procedures, including the voting status of nonmembers, are internal union matters. Nonmembers may elect to retain their nonmember, nonvoting, nonparticipatory status, or, if they are sufficiently interested or concerned about an upcoming affiliation vote, they may become members and participate under normal union rules. That the option to participate in an affiliation election is not accorded to nonmembers differs little from their exclusion from other internal matters, including strike votes and contract ratification votes, and the selection of officers, stewards, and negotiators. But we have not found exclusion of nonmembers in those instances unlawful or incapacitating. [Footnotes omitted.]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
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WILLIAM A. LUBBERS
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National Labor Relations Board

JULY 1980

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SIXTH REGION

Case No. 26-AC-24

THE COCA-COLA BOTTLING COMPANY
OF MEMPHIS

EMPLOYER

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION 1196[1]

PETITIONER

DECISION AND AMENDMENT OF CERTIFICATION

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing

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[1] On April 24, 1974, the Regional Director, Region 26, issued an Order reopening hearing for the primary purpose of taking evidence on the issue of labor organization. On April 26, 1974, the hearing was reopened and the Petitioner moved that the Petitioner's name be amended on the Petition to International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196. The Employer objected to Petitioner's Motion to amend the petition and moved that on the basis of the Petitioner's Motion the Petition be dismissed. The Hearing officer granted the Petitioner's Motion to amend the Petition and referred the Employer's Motion to dismiss to the Regional Director. Inasmuch as the Employer's contentions in support of its Motion are the same as those advanced in opposition to the amendment of certification, and having found that the amendment is proper, I hereby deny the Employer's motion.

was held before a Hearing Officer of the National Labor Relations Board on March 20, 1974, at Memphis, Tennessee. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its power in connection with this case to the undersigned Regional Director.

Upon the entire record[2] in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner[3] proposed to amend the certification as follows:

> By changing the certification from International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers to International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196.

3. Pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted under the supervision of the Regional Director in Case No. 26-RM-238, and, thereafter, on June 20, 1968, the Acting Regional Director certified International Union of

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[2]The Employer and Petitioner filed briefs which have been duly considered.

[3]I find that the Petitioner exists for the purpose of representing the employees with respect to their wages, hours and working conditions, and that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. *Southeastern Rubber Manufacturing Co.*, 173 NLRB 796.

United Brewery, Flour, Cereal, Soft Drink and Distillery Workers as the exclusive collective bargaining representative of certain employees of the Employer at its Memphis, Tennessee, location.[4] Thereafter, the Employer and International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers and its Local No. 196 entered into a collective bargaining relationship and at the time of hearing there was a 3-year collective bargaining agreement in effect which expires on November 12, 1974.

On or about October 1, 1973, the Executive Board for Local 196 met and appointed W. H. Bailey, business agent and financial secretary of Local 196, as a delegate to go to a convention and vote "yes" on the issue of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers' affiliation with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. On the following day, on or about October 2, 1973, at a regularly scheduled membership meeting, the minutes from the Executive Board proceeding were read and approved by 53 union members in attendance at said meeting. The Petitioner does not rely on this meeting as an approval through "democratic process" of its membership as to the affiliation issue.

At the October 1973, convention, the International Union of United Brewery, Flour, Cereal, Soft Drink

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[4] All production and maintenance employees at the Coca-Cola Bottling Company of Memphis, Memphis, Tennessee, operation, including driver-salesmen, driver-helpers, helpers, relief drivers, pre-mix, advertising, garage, cooler and fork lift employees, excluding office clerical employees, guards, professional and technical employees, and supervisors as defined in the Act.

and Distillery Workers of America and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, executed a memorandum of understanding wherein it was agreed to merge the two international unions effective December 31, 1973.

On or about November 16, 1973, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America granted Local 196 a charter as Local 1196 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. At the time of granting the new charter, Local 196 had current collective bargaining agreements with eight employers in the Memphis, Tennessee, area. Local 1196 continued to pursue and enforce these collective bargaining agreements and seven employers continued to deduct and forward dues to Local 1196, handle grievances and deal with that Local with the exception of the Employer herein.

Local 1196 continued to operate with essentially the same officers as Local 196. Approximately two months after the granting of the charter, in January of 1974, Bailey and Bill Argol, former president of Local 196, resigned. Bailey's position was filled by Bill Maxwell, the then treasurer and executive board member, and Pinky Burton, the former vice president of Local 196 and then current vice president of Local 1196, assumed Argol's former position as president of Local 1196. (Argol has since been elected president of Local 1196.)

At the same time of merger, Local 1196 assumed custody of and utilized Local 196's minute books, continued to occupy the same office, continued using the

same bank accounts, and continued to administer all of Local 196's contracts. However, the Employer herein refused to recognize Teamsters Local 1196 as the exclusive bargaining representative of its employees contending that Local 196 was still in existence. On February 1, 1974, Local 1196 of the International Teamsters filed a petition for amendment of certification in Case No. 26-AC-23. On February 12, 1974, the Petitioner withdrew this petition after counsel advised of the Board's requirement to insure employees in the unit a democratic opportunity to determine whether they wished to affiliate.

Thereafter, on or about February 19, 1974, the Petitioner posted notices in several locations such as by the time clocks and the bulletin board near the work stations, locations normally utilized for posting of union information at the Employer's plant. The notice was addressed to "All Union Members Employed at Coca-Cola" and stated that a union meeting would be held at 2:00 p.m. on Sunday, March 3, 1974, at Teamsters 984 Union Hall. The purpose of the meeting was reflected in the "agenda" portion of the notice and reads as follows:

> **AFFILIATION VOTE**
>
> The purpose of this meeting is for all union members at Coca-Cola to consider and discuss the question of affiliation of Local Union No. 196 with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and to vote in the secret ballot election on the affiliation.

The Employer removed these notions from the bulletin board, asserting that Local 1196 was not the col-

lective bargaining representative of its employees and, therefore, had no right to post "controversial" literature in its plant. The Petitioner continued to repost notices of the meeting after their removal by the Employer and ultimately handbilled the notices to approximately 150 of the unit employees at the plant.

The voting was held at the time and place scheduled. Lynn Agee, Petitioner's counsel, was introduced to the membership by Maxwell. Agee announced the purpose of the meeting as for the union membership to decide by secret ballot whether Local 196 should affiliate with the International Brotherhood of Teamsters and opened a discussion period on the pros and cons of affiliation with the membership. One member wanted to know what the Teamsters was going to do for the employees. Agee referred the question to Dave Hodgins, a representative of the Southern Conference of the Teamsters, who answered the question with the remark, "What are you people going to do for the Teamsters." After the discussion period, the eligible voters formed a single file line in front of two checkers, who checked off the name of the individual members from a list they had before them. The eligibility list was comprised of approximately 122 employees who were on Local 196's dues checkoff with the Employer and 100 employees who had signed Teamsters dues checkoff authorization cards which had been transmitted to the Company.[5] After the individual

[5] Of the 100 Teamsters dues checkoff authorization cards there were a maximum of 8 to 10 duplicate cards of employees who were also on dues checkoff under the old Local 196 union dues checkoff cards. Thus, there were approximately 212 employees on the eligibility list.

voter was checked off the list, he received a ballot from Agee. Upon receipt of the ballot the voter entered one of two unmarked, curtained and private booths. Only one person at a time was allowed in the booth. After the voter marked the ballot, the voter deposited the ballot in one of two secured ballot boxes. The ballots stated:

BALLOT OF AFFILIATION

To Affiliate with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Yes ☐	No ☐

At the conclusion of the balloting, the ballot box was secured and initialed and taken to a table. Union members were selected for the tabulation of ballots. The results of the election were 78 votes for affiliation, 3 against and 1 void ballot.[6]

The only unit employees denied the right to vote were several Coca-Cola employees who presented themselves at the polls and were denied the right to vote when their names did not appear on the eligibility list.

After the Coca-Cola election, a similar election was conducted among Petitioner's members employed by

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[6]The only marking on the void ballot was the signature of the voter and no mark was in either the "yes" or "no" block provided on the ballot.

the other seven employers under contract. The results of this election was 119 votes cast for affiliation and 1 against.

The Employer opposes the amendment to certification on the basis that the election procedures utilized by the Petitioner failed to give unit employees an "opportunity to consider" and vote on the question of affiliation. In support thereof, the Employer contends that Hodgins' "speech" was strongly in favor of affiliation with the Teamsters and that nothing was presented to rebut same which precluded the voters the opportunity to consider the pros and cons of the affiliation vote. The evidence adduced at the hearing does not support Respondent's contention. The Employer presented no witness in regard to the remarks that Hodgins allegedly made at the March 3, 1974, meeting. As noted above, the only remark attributed to Hodgins was his response to a question from a union employee.

The Employer further contends that prior to the March 3, 1974, meeting Randy Krone, a shop steward for Local No. 196, had requested information from Maxwell concerning the meeting and was advised by Maxwell that there was not going to be a vote on affiliation but merely an attempt to sign up new members for the Teamsters. Maxwell testified to a similar conversation; however, according to Maxwell, this conversation occurred a full three weeks prior to the March 3 meeting and before a regularly scheduled union meeting at which attempts were, in fact, made to sign up Teamsters. Krone admitted that he had observed the notices posted at the plant announcing the

March 3 meeting and the purpose thereof. I, therefore, find that Maxwell did not mislead Krone as to the purpose of the March 3, 1974, meeting. I further find that Agee's introduction at the March 3, 1974, meeting, advising the employees that the purpose of such meeting was to discuss and then vote by secret ballot on the issue of whether Local 196 should affiliate with the International Brotherhood of Teamsters, to be a sufficient and adequate opportunity to consider the pros and cons of the affiliation vote.

The Employer contends that, for an amendment to certification to be proper, not only the union employees involved must be allowed to vote, but also that the unit employees who are not union members must be allowed to vote. The Employer points to the fact that only 78 votes were cast for affiliation while the unit is composed of approximately 400 employees. The Employer further asserts that there were only 100 Teamsters authorization cards and that 25 of these cards were obvious forgeries. However, the voting eligibility list was comprised of "union members" which included 122 employees on Local 196's union dues checkoff and the approximately 100 card signers on the Teamsters' authorization cards for a total of approximately 212 eligible voters. [See footnote 5 herein.] The fact that nonmembers of Petitioner were ineligible to vote does not invalidate the election. All members, and nonmembers who chose to become members, were given the opportunity to vote if they so desired. See *North Electric Company*, 165 NLRB 942. Nor am I persuaded that the number of votes actually cast denies the election validity. It is well established that where adequate opportunity to vote is provided to all

those employees eligible to vote, the decision of the majority actually voting is binding upon all in the conduct of democratic elections. See *United States Gypsum Company*, 164 NLRB 931; *The East Ohio Gas Company*, 140 NLRB 1269.[7]

4. Accordingly, the certification of representative issued on June 20, 1968, in Case No. 26-RM-238, shall be, and it hereby is, amended as follows:

> By substituting the name International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196.

as the certified Union.[8]

Dated at Memphis, Tennessee, this 7th day of May 1974.

/s/ JOHN F. HARRINGTON
JOHN F. HARRINGTON, ACTING DIRECTOR
Twenty-sixth Region
National Labor Relations Board
746 Clifford Davis Federal Building
167 North Main Street
Memphis, Tennessee 38103

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[7]The alleged 25 forged Teamsters cards were not received into evidence and there is no evidence that any of the alleged 25 forged card signers attempted and did in fact vote in the election. However, even if the 25 forged card signers had voted in the election and had voted against affiliation, there would still have been an overwhelming majority vote in favor of affiliation. Cf. *Hamilton Tool & Die Co.*, 190 NLRB 571 at page 574.

[8]This is not to be construed as a recertification. Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by May 20, 1974.

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